SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

BRASWELL MOTOR FREIGHT LINES, INC., and CLARINDA K. SHAYLER, INDIVIDUALLY AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED,
Appellants

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL,
Appellees

On Appeal from the United States District Court
For the Western District of Texas, El Paso Division

Jurisdictional Statement

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OPINIONS BELOW

The opinion of the District Court is reported at ..... Fed. Supp. ..... (*Appendix A*, pp. A-1 - A-10, infra.), reported at 1966-1967 Federal Carriers Cases, ¶ 81,938. The report of the Interstate Commerce Commission (*Appendix B*, pp. B-1 - B-32, infra.) is printed at 101 M.C.C. 1. The Report of the Examiner is attached hereto as *Appendix C*, pp. C-1 - C-67, infra.

JURISDICTION

This Action was originally brought under *28 U.S.C. 1336, 1398, 2284* and *2321-2325*, to set aside a portion of an order of the Interstate Commerce Commission.

The final judgment of the District Court (*Appendix A*, pp. A-1 - A-10, infra.) was entered on 14 July 1967. Appellants herein filed notice of appeal on 11 September 1967.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by *28 U.S.C. 1253*, *2101(b)*, and *49 U.S.C. 305(g)* and *(h)*; *Alton R. Co. vs. United States*, 315 U.S. 15; *Federal Communications Commission vs. RCA Communications, Inc.*, 346 U.S. 86.

STATUTES INVOLVED

Section 5(2)(a), 49 U.S.C. 5(2)(a), requires prior approval of the Interstate Commerce Commission for all unifications, mergers, and acquisitions of control of two or more carriers. In this connection, *Section 5(2)(a)(i), 49 U.S.C. 5(2)(a)(i)*, provides:

> "§ 5, par. (2). Unifications, mergers, and acquisitions of control.
>
> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> "(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a per-

son which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;"

Section 5(2)(b), 49 U.S.C. 5(2)(b) provides:

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a

carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Section 5(2)(c), 49 U.S.C. 5(2)(c) provides:

"In passing upon any proposed transaction, under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Section 7(d), 5 U.S.C. 1006(d), provides:

"(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely

request be afforded an opportunity to show the contract."

Section 210a(b), 49 U.S.C. 310a(b), provides for grant of temporary authority as follows:

> "(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

Section 10, Administrative Procedure Act, 5 U.S.C. 1009, provides for judicial review, and as pertinent here *Section 10(e), 5 U.S.C. 1009(e)*, provides as follows:

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed;

and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The National Transportation Policy sets out the overriding considerations in an acquisition proceeding.[1]

---

[1] "National Transportation Policy: 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.'"

NATURE OF THE CASE

By application filed 11 February 1963 Braswell Freight Lines, Inc., of El Paso, Texas, hereinafter called Braswell Freight, and Clarinda K. Shayler, Individually and as Executrix and Sole Devisee of the Estate of Warren G. Shayler, Deceased, hereinafter called Vendor, sought authority under Section 5(2) of the Interstate Commerce Act, *49 U.S.C. 5(2)*, for approval by said Commission of Braswell Freight's purchase of Vendor's certificate of convenience and necessity No. MC-70380 for the sum of $250,000.00. The Vendor's operations have their roots in a "grandfather" application.

By the same application J. V. Braswell of El Paso, Texas, who controlled Vendee, Braswell Freight, through ownership of 99% of the capital stock of Braswell Motor Freight Lines, Inc., hereinafter called Braswell Motor, which in turn owned 100% of the capital stock of Braswell Freight, sought authority under Section 5 to acquire control of the operating rights of Vendee. While said application was pending, Braswell Motor and Braswell Freight were merged, with Braswell Motor as the surviving corporation. Braswell Motor was thereupon substituted as Vendee. See footnote 3 of the Commission's decision herein.

By joint application, also filed on 11 February 1963, the parties sought authority under *Section 210(a)(b), 49 U.S.C. 310(a)(b)*, for approval of temporary operations by Braswell Freight pending final determination of the Section 5 proceeding. Temporary authority operation was granted by the Commission on 25 Feb-

ruary 1963, and such operation began as of 18 March 1963.

The application was set for hearing before an examiner and hearing was held in Oklahoma City, Oklahoma, beginning 4 November 1963, concluded on 15 November 1963. The application was supported by seventy (70) public witnesses—shippers or receivers of freight.

The examiner's report and recommended order was served on the parties 29 December 1964. Exceptions were filed under the Commission's procedural rules, and applicants replied. Commission's Division 3, an appellate division, entered its decision on 20 December served on the parties on 30 December 1965.

Braswell Motor filed petition for reconsideration. It requested, first, that the Commission take official notice of its own records, and, second, that the record be reopened for receipt of such records in evidence. Final action of the Commission came on 19 July 1966, not served upon the parties, however, until 6 September 1966.

The Interstate Commerce Commission found that the proposed acquisition should be approved, 101 M.C.C. 1, *(Appendix B)*; but, so far as pertinent here, found that such approval should be conditioned as follows: "(T)hat the operating authority acquired from Warren G. Shayler, W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix), shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for

the purpose of providing single-line service to or from points in Arizona and California."

The core of the question presented is whether or not in a Section 5(2) application, where the statutory standard is "public interest," existing carriers are entitled to protection.

The answer must, of course, depend upon the answer to several coordinate issues, each of which is equally important. And it may be noted here and now that the public interest transcends competitive effect. By Congressionally prescribed standards, by the Administrative Procedure Act, and by the National Transportation Policy, the Congress has made this clear and has undertaken to secure the public interest. It is clear that, although existing carriers are a part of the public, they are only one small segment of it, and that their interest must yield to the greater national public interest.

The coordinate issues will develop as we proceed.

QUESTIONS PRESENTED

Although *Section 5(2)(b)* prescribed "the public interest" as the criteria in unifications, mergers and acquisitions, the Interstate Commerce Commission applied the criteria of "public convenience and necessity" as fixed in *Section 207, 49 U.S.C. 307*, applications for new or initial certificates, and held that, as to Arizona and California points, "*Where the institution of a new service is proposed*, applicants must show a need therefor" and that "In our opinion the record here is clear that approval of the instant transaction would have

a substantial adverse effect upon existing carriers operating from and to points in Arizona and California."

The District Court said that the question for review was: "Whether the Commission's conclusion (101 M.C.C. 1) that the Braswell acquisition of the Shayler rights was consistent with the public interest subject to the restriction against use of the unified rights for the providing of single-line service to and from points in Arizona and California is supported by adequate findings based upon substantial evidence and is in accord with applicable law."

The District Court, tracking the Commission, found that the service proposed by Braswell Motor Freight Lines, Inc., "would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier."

Again tracking the Interstate Commerce Commission, the Court said that "Because of its strong financial condition and ability to perform a single-line service to and from points in the vendor's territory, it could reasonably be expected to continue and in all likelihood to increase the amount of traffic handled under the temporary permit."

The Court concluded, however, that:

> "*The most important issue involved* in this case *is not* whether the protestants showed that an unrestricted approval of the acquisition by Braswell *would have a materially adverse effect* on their operations *but whether Braswell proved a public need for the new service.* The finding of

the Commission that it failed to do so is supported by substantial evidence." (Emphasis ours).

But the question is not "public need," i.e., convenience and necessity. It is the "public interest."

The issues necessarily determinative of the crucial question, hereinabove called the core of the case, are:

1. Did the Interstate Commerce Commission misapply statutory standards in this Section 5(2) proceeding?

2. Did the Interstate Commerce Commission make adequate basic findings in this Section 5 proceeding and the reasons therefor as required by *5 U.S.C. 1007(b)*, such as to enable the Court to intelligently determine the basis of the Commission's action?

3. In proceedings involving issues of the nature here presented, the critical issue is *whether* and *to what extent* existing carriers will be faced with a new competitive service *rather than* an improvement of an existing service; and, in the event it is found that a new service would evolve, would compensatory public benefits offset the detriment to the public that might result from any adverse effect on the services and operations of competing carriers.

4. Did the Interstate Commerce Commission in wholly failing to address itself to the foregoing question, and the Court in ignoring it, violate statutory criteria and the overriding National Transportation Policy and thus result in an order which is so arbitrary, capricious and an abuse of discretion, that it is

violative of *Section 10(e)* of the *Administrative Procedure Act, 5 U.S.C. 1009(e)*, that it must be set aside?

5. In a proceeding involving issues such as here presented, did the Interstate Commerce Commission grossly abuse its discretion *(Section 10(e), Administrative Procedure Act)* in making a mere predictive forecast of adverse effect on competitors, when after more than two full years of operation under temporary authority, the means for an exact determination being at its command, it refused to take official notice of its own records *(Section 7(d), Administrative Procedure Act)* and refused to reopen the record, timely request having been made, for receipt of those records in evidence?

6. Did the Interstate Commerce Commission in refusing to reopen the proceeding for the purpose of receiving in evidence *Appendix E* hereof plainly violate the "rule of prejudicial error"? *5 U.S.C. 1009(e)*, last sentence?

7. Did the Interstate Commerce Commission, in failing to take into account the revenues, tonnages and operating ratios for nine months of competitive operations under temporary authority, clearly establishing no adverse effect (collated in footnote 3 as taken from the Examiner's Report, Appendix 3), plainly violate the "rule of prejudicial error"? (Last sentence of *5 U.S.C. 1009(e)*).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented are substantial and highly important to the public interest. The District Court, reciting some platitudes of administrative law, never reached the crucial questions. It is certainly a substantial question when the issue in substance is whether the Interstate Commerce Commission may in a Section 5 proceeding apply, with immunity, the criteria applicable to a Section 207 proceeding. The criteria in Section 207 proceedings is vastly different, convenience and necessity—need for the service, from the criteria provided in a Section 5(2) proceeding, public interest. Congress prescribed each criteria in very different language and obviously intentionally so, especially in view of the overriding National Transportation Policy.

Section 207(a), 49 U.S.C. 307(a), "a certificate will be issued . . . if it be found that . . . the proposed service . . . is or will be required by the present or future public convenience and necessity."

But compare *Section 5(2)(b)*, "whenever a transaction is proposed under subdivision (a) . . . If the Commission finds . . . that . . . the proposed transaction . . . will be *consistent with the public interest* it shall enter an order approving" etc.

"Public interest" and the National Transportation Policy are the sole criteria. The factors to be considered in a Section 5(2) proceeding are set out in *Section 5(2)(b)* and emphasized in *McLean Trucking Co.*

vs. United States, 321 U.S. 67 (75-76).[2]

But the Commission nowhere in its decision addressed itself to the question of "public interest" and the factors mentioned by this Court in *McLean Trucking Co.*, supra. Instead the Commission found that in this Section 5 proceeding applicants had to prove a need, convenience and necessity, the Section 207 criteria, for what it called a new service, in an end to end joinder of old and long established routes.

Then the Commission's finding was that competing carriers would be substantially adversely affected, not that their service was adequate. The Commission simply rolled the criteria of Section 207 and 5(2)(b) into one ball of wax and came up with such a confused decision that it is impossible to tell, based upon statutory standards, whether it is fish or fowl, i.e., what criteria it did apply. Apparently the Commission applied the criteria of Section 207.

The Interstate Commerce Commission has, of course, a broad discretion but "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Commission vs. RCA Communications, Inc.*,

[2]In *McLean's* case it is said: "The Commission is empowered to authorize and approve a consolidation either as applied for or as qualified by such terms and conditions as it deems 'just and reasonable,' if it finds that the merger 'will be consistent with the public interest.' Section 5(2)(b). In passing upon a proposed consolidation the Commission is required to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.' Sections 5(2)(c)."

346 U.S. 86, 90; *Burlington Truck Lines, vs. United States*, 371 U.S. 156, 167. And the Interstate Commerce Commission must exercise its discretion under *Section 5(2)(b)* within the bounds expressed by the standard of "public interest."

To further secure that actions of administrative agencies be kept within statutory standards and criteria, the Congress felt it necessary to enact the *Administrative Procedure Act, 5 U.S.C. 1001* et seq. In this case *Sections 7(d), 5 U.S.C. 1006(d)* and *10(e) 5 U.S.C. 1009(e)*, must be taken into account, for the Commission's order here is violative of each.

STATEMENT

The issue here is "public interest." Considering the Commission's order here in context and entirety, the final controlling issue was, and it is, whether approval of the transaction would have such a substantial adverse effect upon existing competitive carriers that such adverse effect outweighs the resulting advantages to the public.

The record here is clear that Vendee had operated in competition with existing carriers a part of the first quarter of 1963, all of the second and third quarters and a part of the fourth quarter of 1963. See Report of Examiner, *Appendix C*, pp. C-1 - C-67. To determine the foregoing question the Examiner compared protestants' 1962 operating ratios with their operating ratios for the first three quarters of 1963

with the results shown below.[3] These had been offered in evidence.

The operating ratios used *were in evidence* and were taken from the Interstate Commerce Commission's own records in the form of reports required by *Section 220(a)* and *(b)*, *Motor Carrier Act of 1935*, *49 U.S.C. 320(a)* and *(b)*, by all motor carriers to said Commission. It will be noticed that although Vendee was operating in competition with the existing carriers during that 1963 period, the operating ratios remained steady—in other words, Vendee's competition showed no adverse effect whatsoever, even though that was the period of operation which was so "startling" to the Commission. *Appendix B*, p. B-24.

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[3]

Carrier	*OPERATING RATIOS*			
	1962	*1963*		
		First Quarter	*Second Quarter*	*Third Quarter*
Be-Mac	91.5	95.2	91.7	90.5
Campbell	92.3	97.3	89.5	92.4
Forwarding	94.8	94.8	92.7	92.9
Freightways	98.9	103.3	98.8	95.0
Denver-Chicago	91.1	93.6	90.1	86.6
Texas-Arizona	91.3	94.0	90.7	91.3
ICX	92.6	97.7	94.2	93.4
Lee Way	95.8	98.5	94.9	98.1
Navajo	97.2	98.9	96.2	94.3
PIE	94.0	97.2	93.6	93.4
Ringsby	95.3	95.9	95.2	95.8
Roadway	90.6	93.8	89.3	89.3
Southwestern	98.9	99.5	94.8	96.6
Arizona	95.5	94.5	94.8	95.2
Transcon	87.1	88.8	85.6	84.3
Watson	103.5	105.6	99.8	96.1
Viking	96.6	99.8	93.5	93.6
Western	99.3	91.9	96.1	97.3
Gillette	94.3	89.5	94.2	94.5
Voss	95.5	111.8	100.1	86.7

By the time the Commission, or its Division 3, acted upon the application, Vendee had been operating in competition with existing carriers for all of the fourth quarter of 1963, all of the year 1964, and the first three quarters of 1965, and before the Commission overruled the petition for reconsideration the competition covered all of 1965 and part of 1966.

If the Commission had not been so "startling(ed)" by resulting use by the public, which in our opinion showed an imperative need for the service, it surely would, well knowing the real issue—"public interest" —have taken a tip from the operating ratios for the 1963 period and have taken official notice, *Administrative Procedure Act, Section 7(d), 5 U.S.C. 1006(d)*, of operating ratios for all of the years 1963, 1964, and at least the first three quarters of 1965. These operating ratios *would have given the exact answer* rather than a speculative conclusion which turned out to be false, and would have demonstrated beyond question of doubt that Vendee's temporary operations over that long period of time had had no adverse effect whatsoever upon existing carriers. Not only that, but had the Commission taken notice of its own records, prepared and filed by the competing carriers themselves, those records would have shown beyond peradventure of doubt an imperative need for the joinder of the Braswell-Shayler routes, else why the extensive use; and most importantly that existing carriers had not been adversely affected but that there had been no effect whatever. None! Most, if not all, of the intervening appellees here had, as *Appendix E* hereof

shows, increased their revenues and tonnages and had equally as good or even better operating ratios.

But the Commission did not do that, even though it is so authorized by *Section 7(d)* of the *Administrative Procedure Act*, and even though the results of the competitive operations, shown in footnote 3, strongly suggested that it be done, and *Section 5(2)(c)*, *49 U.S.C. 5(2)(c)*, sets it out as one of the issues to be determined, and the National Transportation Policy demanded it. In this the Commission also disregarded the "rule of prejudicial error." *5 U.S.C. 1009(e)*, last sentence.

And let it be said that a fair determination, both to the applicants and the *public*, demanded it. See the "rule of prejudicial error," supra.

The Commission refused to take official notice although *Section 7(d)*, *5 U.S.C. 1006(d)* authorizes it, and although the real issue demanded it. For says the Commission in a comparable case:

> "*In view thereof and of the issues presented*, we believe that we should take official notice of the data contained in such reports for those carriers interlining with Transport, for the years 1958 and 1959, insofar as it shows their operating net income or deficit, and their operating ratio. In so doing, and in consonance with the provisions of section 7(d) of the Administrative Procedure Act, the effectiveness of our prior order will be deferred for a sufficient period to allow any party herein to petition for reopening of the proceeding for a further hearing for the purpose of showing reasons, if any, why the referred to data should

not be considered." *Transport Motor Express, Inc. —Purchase—Marfise*, 85 M.C.C. 447, 456-457, Cf. *Market Street R.Co. vs. Commission*, 324 U.S. 548, and *State of Wisconsin vs. Federal Power Commission*, 201 Fed.2d 183, cited in *Marfise*, supra.

The issue of consistency with the public interest, in this case boiled down to a finding by the Commission "that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California," Commission decision, 101 M.C.C. at page 17 (*Appendix B*, p. B-27), it does seem positive, as the Commission said in *Transport Motor Express, Inc.— Purchase—Marfise*, supra, that:

> "Despite the foregoing, *in order for us to appraise intelligently the likely competitive effect* of the transaction on the operation of protestants, it is necessary to possess some information" etc. (Emphasis ours), p. 456.

It was as necessary here if the Commission was "*to appraise intelligently.*" However, the Commission made its determination purely on a speculative conclusion. The speculative forecast (conclusion) is without substantial evidence to support it. The only probative evidence is to the contrary. See footnote 3, operating ratios of protesting carriers, during a nine month competitive period. The protesting carriers had themselves, at the hearing, put into the record their operating reports showing revenues, tonnages and operating ratios, summarized in *Appendix D* attached hereto.

Protesting carriers, actually only some of them, filed exceptions to the Examiner's Report. In applicants' reply dated 9 April 1965 Vendor and Vendee requested the Interstate Commerce Commission to take official notice of its own records (made by the carriers themselves), and to make it easy there was incorporated in said reply the protestants' revenue, tonnage and operating ratio of each protestant for the years 1962, 1963, and 1964. That compilation is attached hereto as *Appendix E*. Protestants filed motions to strike *Appendix E*. The Commission did not strike but closed its eyes to the obvious, and, for some unknown reason, apparently preferred to make an obviously erroneous predictive forecast (even with the evidence before it—*Appendix D*) rather than to open its eyes to realities. But by so doing the Commission ran afoul of the rule of prejudicial error.

The uncanny thing is that the Commission denied, although *its chief concern was not protection of existing carriers* but to the contrary to ascertain where the public interest lay. The Commission's search for the truth should have been the really important thing, guardian of the public interest as it is, but apparently the Commission having a choice, as in *Transport Motor Express, Inc.—Purchase—Marfise*, 85 M.C.C. 447, chose to close its eyes to reality and make a highly speculative predictive conclusion which both *Appendices D* and *E* conclusively show to be utterly and completely fallacious.

The Interstate Commerce Commission cast its first principal conclusion in terms of the statutory stand-

ards of a Section 207 (public convenience and necessity) proceeding. This is clearly and plainly improper and erroneous and requires reversal, for this case is controlled by the statutory standards prescribed for a *Section 5(2)(a)* and *5(2)(b)* proceeding. There is no room for choice. *To choose is to exceed statutory authority.* It is arbitrary action condemned by *Section 10(e)* of the *Administrative Procedure Act.*

Said Commission's second principal conclusion is cast in terms only partially applicable to a Section 5(2) proceeding. It is merely one factor which is to be considered.

However, if the second principal conclusion, i.e., that competing carriers would be substantially adversely affected, then it became the duty of the Commission to weigh such adverse effects against the advantages to the public and make a determination of where the public interest lay, i.e., whether in the circumstances the public interest in "adequate, economical and efficient service," outbalances whatever public interest there is in protecting existing carriers' revenues in order to "foster sound economic conditions in transportation and among the several carriers." *National Transportation Policy, 49 U.S.C. preceding Sections 1, 301; McLean Trucking Co. vs. United States,* 321 U.S. 67, 76.

It is not clear, and we do not know, what the Commission intended. This Honorable Court must know, for "a simple but fundamental rule of law" is "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is

authorized to make, *must judge the propriety of such action solely by the grounds invoked by the agency.* If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (Emphasis ours). *Securities and Exchange Commission vs. Chenery Corporation*, 332 U.S. 194, 196.

Nowhere in the Commission's decision, not even once in any respect, did the Commission weigh the evidence to determine where the public interest lay. Not even one finding of fact did the Commission make in respect to "public interest." Unless, of course, the finding of substantial adverse effect on existing carriers was so intended. But the finding just referred to was one, but only one, factor and it was never correlated to any other necessarily required finding.

Moreover, that cannot be considered to be the case because the Commission preceded that finding with the statement: "In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are *entitled to protection* from the establishment of additional competition," 101 M.C.C. at page 17 (*Appendix B*, p. B-26). That is not true in a Section 5(2) proceeding.

That obviously takes the Commission right back to its falacious pursuit of application of the statutory standards of a Section 207 application; hence confirms the Commission's misapplication of statutory standards.

For the Court to determine whether the agency has

exercised its discretion within the bounds of statutory standards, "it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it." *Burlington Truck Lines vs. United States*, 371 U.S. 156, 167; *Federal Communications Commission vs. RCA Communications, Inc.*, 346 U.S. 86, 91.

The naked fact is that, in this Section 5 proceeding, the Commission's decision discloses no rational or competent basis for the exercise of its administrative discretion in the application of the Section 5 statutory standards. The Court should not be compelled to guess. *Atchison T.&S.F. R. Co. vs. United States*, 295 U.S. 193, 201-203. The court there "*repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication.*" (Emphasis ours), citing other cases.

The surprising, if not shocking, thing about the District Court decision is that *it rests entirely upon a Commission decision*, cited as *Pacific Intermountain Express Co. — (Control and Purchase) — Keeshin Freight Lines, Inc., et al*, 57 M.C.C. 341, affirmed by the Commission, 57 M.C.C. 467, and based thereon the District Court holds:

> "Since the public interest requires that carriers already in a territory *be protected, it is immaterial* whether the attempt to invade is through an application under Section 5 or one under Section 207."

This holding illustrates how far afield the District Court went in sustaining the Commission. This hold-

ing would amount to a rule of property, completely contrary to law. The Commission knows this and has never recognized the alleged principle. However, based upon the Commission's decision herein, that was all the District Court had to take hold of.

It is all the more surprising, if not shocking, to note that had the District Court exercised a careful investigation, rather than grab hold at any place it could grab, the District Court would have found that even the Commission has taken notice of the fact that *Pacific Intermountain Express Co.*, supra, had been misinterpreted and the Commission had tried to straighten things out in *Consolidated Freightways, Inc. — Control — Silver Fleet*, 85 M.C.C. 139, 189, saying:

> "In view of the foregoing, we believe it is apparent that the carrier protestants have misinterpreted the scope of the findings contained in the *Keeshin* case. While it is true that, as they contend, we found in such proceeding that the lack of substantial interchange between the applicants would have resulted in the creation of a 'new competitive service,' denial therein was based solely upon the adverse effect the transaction would have produced on the services and operations of competing carriers and the absence of any showing that approval of the transaction would result in offsetting advantages to the public."

The Commission then went on to try to set out the issues involved, saying:

> "The importance in a section 5 proceeding of

the factor of the quantum of traffic interlined in the past by applicants pertains entirely to the greater issue of the manner and extent which a transaction will affect the operations of competing carriers. In other words, a substantial interline of traffic between applicants in the past is generally indicative of the fact that existing carriers have already been faced with, and adjusted to, the competition of their joint-line service. Under these circumstances it can be fairly concluded, in most instances, that approval of a transaction would cause little impairment in the existing services of competing carriers. At the opposite extreme, in instances where applicants have not interlined traffic moving between their respective areas of operation with one another or other carriers, it is similarly evident that their unification could readily result in serious disruption of the present competitive balance and the impairment of the operations and services of competing carriers. *It should be emphasized, however, that past interchange constitutes only one element in our appraisal of the effects a transaction would likely have upon the operations and services of existing carriers, and, by itself, is not controlling in the determination of the ultimate issue.* (Emphasis ours) Compare *Transcon Lines—Purchase—B & M Exp., Inc.*, 75 M.C.C. 693, and also *Transcon Lines—Purchase—Missouri-Oklahoma Exp., Inc.*, 80 M.C.C. 79."

Equally surprising is the fact that the District Court completely *overlooked* in *Pacific Intermountain Express* a correct statement therein, *construing the Commission's duty in a Section 5 proceeding*, supra, at page 470, as follows:

"Before we may approve a transaction under section 5 of the act, we must find that it will be consistent with the public interest, a concept which has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25. Such a concept obviously embraces the interest of competing carriers as well as that of shippers and consignees. We appreciate that, contrary to the situation in a proceeding under section 207, we are here dealing with existing operations under section 5. It was not our intention in the prior report to reflect any new policy under the latter section. We think that under that section it has been and is our duty to consider the effect which a proposed new unified service will have on the continuance, efficiency, and economy of existing carrier services, and, if such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency, and economy of existing carrier services, to the detriment of the public, whether it would result in offsetting advantages to the public and whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Compare *Virginia-Carolina Freight Lines, Inc.—Control—Burlington Truckers, Inc.*, 87 M.C.C. 341, 345.

Interchange of traffic is not controlling "because they interlined with other carriers shipments moving between points in their respective territories." See

Appendix C at page C-24, "Shayler Operations," and second to last paragraph page C-49, *Appendix C.*

It was especially noted above that the court held that existing carriers were entitled to "be protected." From the decisions cited, it is obvious that this is not necessarily true. Their interest must be weighed against various factors in determining where the public interest lies and subordinated thereto.

As a matter of fact and of law, we wish to stress the fact that certificates of public convenience and necessity which competing carriers hold have never been thought to create a vested right to freedom from competition, and this is obvious from the National Transportation Policy. *Norfolk Southern Bus Corporation vs. United States*, 96 Fed.Supp. 756, 761 (E.D., Va.); *North Coast Transportation Co. vs. United States*, 54 Fed.Supp. 448, 451-452 (N.D., Calif.), affirmed per curiam 323 U.S. 668; *Inland Motor Freight vs. United States*, 36 Fed.Supp. 885, 888-889 (D., Idaho).

The District Court did not touch the issues in this case, top, side or bottom. Appellants have had no judicial review.

As said by Mr. Chief Justice Warren in *American Trucking Association vs. United States and Interstate Commerce Commission*, 364 U.S. 1, 6:

> "The critical issue raised by appellants is whether the Commission exceeded its statutory authority by granting the permits in question to a railroad subsidiary without imposing more stringent limitations than it did. On this question,

> the lower court unanimously ruled against appellants. *This judgment must be evaluated in the light of this court's previous decisions, set against the background of Commission practice.*" (Emphasis ours).

To a considerable extent we have already discussed that "background," but let us explore that background and Commission "practices" in Section 5 proceedings further.

Admittedly the Commission "has been given a wide discretion," *but "that discretion has limits."* (Emphasis ours). *American Trucking Association vs. United States*, supra.

We have heretofore called attention to the vital questions to be determined in a Section 5 proceeding.

Upon each of the questions arising under *Section 5(2)(b)* and Section 5(2)(c) there is superimposed the declaration of the National Transportation Policy.

The Interstate Commerce Commission here discussed one of the questions. It reached a clearly erroneous and purely speculative conclusion. See footnote 3 and *Appendices D* and *E*.

The Commission *did not* discuss most of these questions and, *therefore, reached no conclusion.* The Commission *must* make findings on all material issues. The questions set out above are very material. Findings must necessarily be made.

Have Truck Line—Purchase—W. Don Maurer, 97 M.C.C. 361, 369, citing *Mason & Dixon Lines, Inc.*—

Control—Silver Fleet, 90 M.C.C. 829, 843, holds:

> *"It is, therefore, incumbent upon us to determine whether the compensatory benefits which would result from the unification would outweigh the possible adverse effects on the services and operations of competing carriers."* (Emphasis ours).

This the Commission did not do here, although the National Transportation Policy puts that very determination squarely on the Commission's back, for that policy is the yardstick by which the correctness of actions of the Interstate Commerce Commission will be measured. *Schauffer Transportation Co. vs. United States*, 355 U.S. 83; *American Trucking Association vs. A.T. & S.F.R.Co.*, ... U.S. ....., 18 L.Ed.2d 847, 863 (Advance sheets).

Commission's decision after decision so hold, and the National Transportation Policy requires it. The order of the Commission here under review is void.

In connection with evaluation in the light of the Supreme Court's decisions set against the background of Commission practice, we cite just a few cases not cited hereinabove. *J. W. Ringsby—Control; Ringsby Truck Line, Inc.—Control—Northern Transportation Co.*, 58 M.C.C. 594, 598; *T. S. Carter—Control; Interstate Motor Lines, Inc.—Control and Merger—Great American Dispatch, Inc.*, 58 M.C.C. 775, 786, 878, order set aside 243 Fed.Supp. 868, for lack of necessary findings; *Republic Van & Storage Co., Inc.—Purchase —Consolidated Van & Storage Co., Inc.*, 101 M.C.C. 93, 98, this case decided just about the same date as

the decision involved in the case at bar; *The Youngstown Cartage Co.—Control and Merger—Bigley Bros., Inc.*, 93 M.C.C. 318.

The Interstate Commerce Commission has applied the wrong statutory standard—criteria. *Section 5(2)(c), 49 U.S.C. 5(2)(c)* and the National Transportation Policy—the "yardstick" as we have shown, citing authority.

The Interstate Commerce Commission has not made essential findings, as we have pointed out. Several essential findings were not even considered. This is in violation of *Section 7(d), 5 U.S.C. 1008(d); Atchison, Topeka & Santa Fe Ry. Co. vs. United States*, 295 U.S. 193, 201-203; *Florida, et al vs. United States, et al*, 282 U.S. 194, 214-215.

In connection with one essential and required finding the Commission *possibly* intended to be making a finding; but if so, it, first, applied the wrong statutory standard, and, second, the finding is not supported by substantial evidence — a violation of *49 U.S.C. 1007(b)*. And that one attempted and possible finding *is not supported* by substantial evidence, contrary to the requirements of *5 U.S.C. 1009(e)(B)(5)*. The rule has been too many times announced by the Supreme Court to require citation of authority.

The one possible intended finding is so directly contrary to the evidence (see footnote 3, *Appendix D*, *Appendix E*, and the Examiner's Report, *Appendix C*, at pages C-27 - C-30) as to be "arbitrary, capricious (and) an abuse of discretion" in violation of *5 U.S.C.*

1009(e)(B)(1), and is not supported by substantial evidence *5 U.S.C. 1009(e)(b)(5)*.

The Interstate Commerce Commission's finding of adverse effect on existing carriers, and the issues being of the nature that they were, the Commission's action in refusing to take officials notice of its own records pursuant to *5 U.S.C. 1006(d)* and refusing to reopen the proceeding for their receipt in evidence, is so unfair, unreasonable, arbitrary, capricious and abuse of its discretion, and also the Commission's utter disregard of the rule of prejudicial error, *5 U.S.C. 1009(e)*, last sentence, that the order must be set aside.

The Interstate Commerce Commission's challenged order does not disclose the basic facts on which it made the order.

In absence of express findings by an administrative agency, they cannot be supplied by implication.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

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PROOF OF SERVICE

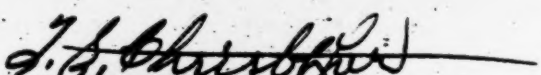
I, T. S. Christopher, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of November, 1967, I served copies of the foregoing Jurisdictional Statement on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Ralph S. Spritzer, Acting Solicitor General, Department of Justice, Washington, D. C. 20530;

to Hon. John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas 78200; and to Hon. Mario J. Martinez, Assistant United States Attorney, El Paso, Texas 79900.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Manny H. Smith, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other Appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Building, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.



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APPENDIX A

Filed July 14, 1967

MAXEY HART, Clerk

By /s/ Elizabeth J. Hubble, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION
NO. 66-125-EP

BRASWELL MOTOR FREIGHT LINES, INC., AND CLARINDA K. SHAYLER, INDIVIDUALLY AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

AND

TRANSCON LINES, A CORPORATION, PACIFIC INTERMOUNTAIN EXPRESS CO., DC INTERNATIONAL, INC., WATSON-WILSON TRANSPORTATION SYSTEM, INC., RINGSBY TRUCK LINES, INC., IML FREIGHT, INC., CONSOLIDATED FREIGHT-WAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS, INC., INTERVENORS.

Judgment

Before THORNBERRY, Circuit Judge, United States Court of Appeals, SUTTLE and GUINN, District Judges.

GUINN, District Judge.

We adopt the Statement of the Case as set out in the Joint Brief of the United States of America and the Interstate Commerce Commission.

STATEMENT OF THE CASE

This is an action brought to set aside in part a report and order of the Interstate Commerce Commission, Division 3, entered December 20, 1965, in Docket No. MC-F-8358, *Braswell Freight Lines, Inc.—Purchase —Warren G. Shayler, W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix)*, 101 M.C.C. 1, and an order of the Commission, Division 3, acting as an Appellate Division, of July 19, 1966, which denied a petition for reconsideration and/or further hearing. In the report and order of December 20, 1965, the Commission found that the purchase by Braswell Motor Freight Lines (Braswell) of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, Executrix) (Shayler rights) pursuant to Section 5(2)(a) of the Interstate Commerce Act (Act), 49 U.S.C. § 5(2)(a), would be consistent with the public interest. However, the Commission made its approval subject to the following restriction: "***provided, however, that the operating authority acquired from Warren G. Shaylor, W. Thurman Shayler, guardian (Clarinda K. Shayler, execu-

trix) shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for the purpose of providing single-line service to or from points in Arizona and California; ***" (101 M.C.C. 18). Plaintiffs' challenge is, therefore, limited to the validity of this joinder restriction.

We accept as the question presented for our determination the following: Whether the Commission's conclusion (101 M.C.C. 1, 17-18) that the Braswell acquisition of the Shayler rights was consistent with the public interest subject to a restriction against use of the unified rights for the providing of single-line service to and from points in Arizona and California is supported by adequate findings based upon substantial evidence and is in accord with the applicable law.

STATUTES INVOLVED

Section 5(2)(a)(i) of the Act, 49 U.S.C. §5(2)(a)(i), sets forth the basic permissibility for one carrier to acquire control of another carrier:

> (2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control

of another through ownership of its stock or otherwise; * * *

Section 5(2)(b), 49 U.S.C. § 5 (2). (b), sets forth procedures and standards:

> (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the person specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; * * * If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

Section 5(13), 49 U.S.C. § 5(13), defines "carrier" as including a motor carrier:

> (13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means * * * a motor carrier subject to part II; * * *

Section 210a(b), 49 U.S.C. § 310a(b), permits the granting of temporary authority:

> (b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

It is undisputed that the order of the Commission lies within the scope of its statutory authority. If the order is based upon adequate findings which are supported by substantial evidence, it must be upheld even though we might reach a different conclusion on the facts presented. *Rochester Telephone Corporation v. U. S.*, 307 U.S. 125, 138-140 (1939). The scope of the judicial review of orders of the Commission was recently passed upon in the Western District in the case of *Alamo Express, Inc. v. United States*, 239 F. Supp. 694, affirmed, 382 U.S. 19 (1965), wherein it is stated: "Our duty is to determine whether the conclusions of the Commission find support in the record as

a whole . . . even though the Court would justifiably have made a different choice had the matter been before it de novo'." See also *C & H Transportation Co. v. United States*, 249 F. Supp. 97. The wisdom and experience of the Commission, not of the Courts, must determine the matters involved on appeal.

Likewise, it is the exclusive province of the Commission to make findings of fact, to draw legitimate inferences therefrom, and to evaluate and determine the weight to be given conflicting evidence. *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353. There is a presumption that the Commission has properly performed its official duties and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 512.

We affirm the Commission's finding that the transaction, in general, would be consistent with the public interest. Since substantial evidence in the record shows that under temporary authority Braswell had been using the Shayler rights to provide a new transcontinental traffic for which no public need was established, we also affirm the joinder restriction imposed by the Commission.

We find that the evidence before Division 3 established the fact that the service proposed by Braswell from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. An analysis of this record appears in the Commission's report (101 M.C.C. 1, 14-16).

The evidence supports the finding of the Commission that Braswell, acting under temporary authority, had built a substantial operation to and from California during the six-month period from March 20 through September 30, 1963. Because of its strong financial condition and ability to perform a single-line service to and from points in the vendor's territory, it could reasonably be expected to continue and in all likelihood to increase the amount of traffic handled under the temporary permit.

It is clear that in a Section 5(2) case involving a proposed new service, the applicant must show a public need for the service proposed. Otherwise, existing services are entitled to protection from the establishment of additional competition. This rule certainly applies to this case and there must be an equivalent of the showing of public convenience and necessity where an applicant seeks new operating authority in a Section 207 proceeding. Since the public interest requires that carriers already in a territory be protected, it is immaterial whether the attempt to invade is made through an application under Section 5 or one under Section 207. *Pacific Intermountain Express Co., etc.*, 57 M.C.C. 341 at 380 (1950), affirmed, 57 M.C.C. 467 (1951).

The most important issue involved in this case is not whether the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations but whether Braswell proved a public need for the new service. The finding of the Commission that it failed

to do so is supported by substantial evidence. (101 M.C.C. 1, 17). There was no evidence of the inadequacy of existing service.

Braswell alleges that the Commission erred in denying its petition for reconsideration and further hearing. Plaintiff sought a further hearing in order to produce evidence of representative transcontinental shipments it made through the Oklahoma City, Tulsa, and Memphis gateways in 1962 and 1963. This evidence was available to plaintiff at all times and could have been produced at the original hearing; further, it did not appear to be of particular relevance to the issue of whether plaintiff was providing a new competitive service between Arizona and California. We find no error in the denial of the petition for further hearing. It is well settled that petitions for rehearing or further hearing are addressed to the discretion of the administrative agency and that denial of such petitions is not open to question unless in clear abuse of discretionary authority. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535. In this case there was not an abuse of discretion.

Plaintiff attaches great importance to the manner in which the Commission reversed the trial examiner. In the final analysis, it is the obligation and duty of the Commission to make its decisions and in so doing it is free to accept or reject the recommendations of its examiners. Administrative Procedure Act, Section 8(a), 5 U.S.C. § 557(c); *Norfolk Southern Bus Co. v. United States*, 96 F. Supp. 756, 758 (E. D. Va. 1950),

affirmed, 340 U.S. 802; *Universal Camera Corp. v. NLRB*, 1950, 340 U.S. 474, at 496.

The complaint of the long delay in completing the case is without merit and could in no sense affect Braswell's rights. The temporary permit was requested with the knowledge that necessarily an indefinite period of time would elapse before final disposition. Braswell could not acquire greater authority by operating under this temporary permit than it was entitled to under the original application.

All points raised by plaintiff not touched upon herein are found to be without merit. We affirm the order of the Commission and the temporary restraining order is dissolved.

/s/ Ernest Guinn
UNITED STATES
DISTRICT JUDGE

United States of America }
Western District of Texas } ss.

I, MAXEY HART, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original JUDGMENT and OPINION

in

NO. CIV-66-125-EP

styled:

BRASWELL MOTOR FREIGHT LINES, INC., et al

-vs-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

and

TRANSCON LINES, CORP., et al.

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at El Paso, Texas this 9th day of October, A.D. 1967,

MAXEY HART,
Clerk.
By Pauline G. Silvers
Deputy Clerk.

[SEAL]

APPENDIX B

MF-2915 *Served December 30, 1965*

INTERSTATE COMMERCE COMMISSION REPORTS—MOTOR CARRIER CASES

NO. MC-F-8358[1]

BRASWELL FREIGHT LINES, INC.-PURCHASE-WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Decided December 20, 1965

---

1. In No. MC-F-8358, purchase by Braswell Motor Freight Lines, Inc., of the operating rights of the estate of Warren G. Shayler, deceased, from Clarinda K. Shayler, executrix and sole devisee of said estate, and acquisition by J. V. Braswell of control of the operating rights through the purchase, approved and authorized, subject to conditions.

2. In Finance Docket No. 22543, application of Braswell Motor Freight Lines, Inc., to issue an unsecured note in the amount of $200,000, bearing interest at the rate of 4 percent per annum, dismissed.

M. Ward Bailey and *Dean Williamson*, for applicants.

Adolph J. Bieberstein, Richard H. Champlin, Morris

[1]This report embraces Finance Docket No. 22543, Braswell Freight Lines, Inc.—Notes.

G. Cobb, Donald L. Cooper, Wentworth E. Griffin, G. F. Gunn, Jr., O. Russell Jones, Robert M. Kaske, Hugh T. Matthews, Lloyd M. Roach, Phillip Robinson, James M. Doherty, Carl L. Steiner, F. J. Steinbrecher, and *Robert W. Wright, Jr.*, for protestants.

L. N. D. Wells, Jr., for labor organization protestants.

Report of the Commission

Division 3, Commissioners Tuggle, Walrath, and Goff

Walrath, *Commissioner:*

Exceptions to the report and recommended order of the examiner were filed by class I rail carriers in the western district, Central Conference of Teamsters and Teamsters Local Union No. 710, and certain protestants,[2] and applicants replied. Our conclusions differ from those of the examiner.

Braswell Freight Lines, Inc.,[3] of El Paso, Tex., and

[2]Western Gillette, Inc. (jointly with rail protestant), Transcon Lines, Roadway Express, Inc., Illinois-California Express, Inc., Consolidated Forwarding Co., Inc., jointly by Viking Freight Company and Be-Mac Transport Co., Inc., and jointly by Denver-Chicago Trucking Co., Inc., Watson-Wilson Transportation System, Inc., Texas-Arizona Motor Freight, Inc., Ringsby Truck Lines, Inc., Pacific Intermountain Express Co., Consolidated Freightways Corporation of Delaware, Missouri Consolidated Freightways, and Interstate Motor Lines, Inc.

[3]In No. MC-8655, *Braswell Motor Freight Lines, Inc.-Merger-Braswell Freight Lines, Inc.*, decided May 5, 1964, (not printed), merger of Braswell Freight Lines, Inc., into Braswell Motor Freight Lines, Inc., for ownership, management and operation, and the acquisition by J. V. Braswell, of control of the operating rights and properties through the merger were approved and authorized, and by supplemental order, in the title proceeding, dated July 16, 1964, Braswell Motor Freight Lines, Inc., was substituted as vendee, in lieu of Braswell Freight Lines, Inc., and as lessee of the properties of vendor under section 210a(b). Reference herein to vendee will be to Braswell Motor Freight Lines, Inc.

Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), of Oklahoma City, Okla., by a joint application filed February 11, 1963, as amended, seek authority under section 5 of the Interstate Commerce Act, for the purchase by the former of the interstate operating rights of the latter for $250,000. J. V. Braswell, also of El Paso, who controls vendee through ownership of 99.89 percent of its outstanding capital stock, seeks authority under the same section to acquire concurrent control of the operating rights through the purchase.

By a separate application filed April 1, 1963, in Finance Docket No. 22543, vendee seeks authority under section 214 to issue an unsecured promissory note payable in 5 equal annual installments with interest at 4 percent per annum in the principal amount not exceeding $200,000. At the hearing vendee requested authority to amend the application under section 5 to show that payment would be in cash, and dismissal of the application under section 214. The requests will be granted, and no further reference need be made to the section 214 application.

A hearing has been held, at which the protestants shown in footnote 2 and Campbell Sixty Six Express, Inc., East Texas Motor Freight Lines, Inc., Fortier Transportation Company, General Expressways, Inc., Knox Motor Service, Inc., Lee Way Motor Freight, Inc., Navajo Freight Lines, Inc., Southwestern Transportation Company, and Voss Truck Lines, Inc., opposed the application. Applicants operate in excess of 20 motor vehicles in interstate or foreign commerce.

The findings of fact, insofar as they relate to the financial condition of applicants, the terms of the proposed transaction, and the operations of protestants, as set forth in the examiner's report, are adopted as our own without being restated, except to the extent necessary for clarity of discussion.

Pursuant to authority granted under section 210a (b) on February 25, 1963, as extended by order of July 17, 1963, vendee leased the operating rights of vendor, pending final determination of the section 5 application, at a monthly rental of $250. Temporary operations were commenced by vendee March 18, 1963.

Vendee operates as a motor common carrier, primarily of general commodities, with exceptions, over a network of regular routes extending from Oklahoma City and Tulsa, Okla., Memphis, Tenn., and New Orleans, La., to Los Angeles, Calif., serving such points as Jackson, Natchez and Vicksburg, Miss., Baton Rouge, Monroe and Shreveport, La., Dallas, Fort Worth, Houston, San Antonio and El Paso, Tex., and Phoenix, Tucson and Yuma, Ariz. In *Braswell Freight Lines, Inc., Extension-Atlanta*, 95 M.C.C. 457, decided July 1, 1964, vendee was authorized to transport general commodities, with exceptions, over regular routes, between Jackson, Miss., and Atlanta, Columbus, and Rome, Ga., serving all intermediate points, including Birmingham and Montgomery, Ala. On July 19, 1965, this proceeding was reopened for reconsideration on the present record. It also has an application pending seeking authority to operate over a direct route between Houston and New Orleans.

Vendor operates as a motor common carrier, over irregular routes, of general commodities, with exceptions, (1) from Oklahoma City and points in Oklahoma within 125 miles thereof to points in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, and the Chicago, Ill. commercial zone, (2) from points in that part of Illinois bounded on the west by Illinois Highways 26, 2 and 88, U. S. Highway 34, Illinois Highway 78 and U. S. Highway 67, on the south by Illinois Highway 9, U. S. Highway 54, Illinois Highway 48 and U. S. Highway 67, on the east by the Illinois-Indiana State line and Lake Michigan, and on the north by the Illinois-Wisconsin State line, to points in Oklahoma, (3) from points in Indiana within the Chicago commercial zone, to points in Oklahoma, and (4) from points in the St. Louis-East St. Louis commercial zone, except points in Illinois within said zone which are located on and north of U. S. Highway 66, to Oklahoma City and points in Oklahoma within 125 miles thereof. It is also authorized to transport carbide, over irregular routes, from Keokuk, Iowa to points in Oklahoma.

In recommending approval of the transaction, subject to a condition requiring cancellation of certain dormant portions of vendor's operating rights, the examiner found (1) that the purchase price is reasonable, (2) that vendee should have no financial difficulty in consummating the transaction, (3) that except for traffic originating in Cook, DeKalb, DuPage, Kane, Lake, Madison, and Will Counties, Ill., and that portion of Illinois in the St. Louis commercial zone, vendor's operating rights from points in Illinois are

dormant and should be cancelled, (4) that reasonably continuous and adequate service was rendered under all other portions of vendor's operating rights, (5) that interchange between vendor, vendee, and others, while not large, has not been of such insufficient volume to find that a new service would be created as a result of unification of the operations, or to warrant the imposition of a restriction on the unified rights, (6) that there is no evidence of conversion of the irregular-route operations of vendor to regular-route under the temporary operations of vendee, (7) that there is no evidence of the diversion of a substantial amount of traffic to the vendee, and (8) that the former employees of the "Shayler operation" were not adversely affected as a direct result of the purchase of the operating rights of vendor.

Protestants, in their exceptions, assert that this transaction involves the purchase, by a carrier that has suffered continuous losses, of operating rights which have likewise been conducted at a loss, for $250,000; that the record does not show the source of value on which the purchase price was predicated, but does show that for the first 9 months of 1963, including the operation of vendor under temporary authority for 6 months, vendee suffered an operating loss of $201,866; and that based on the operating histories of applicants the purchase price is wholly unrealistic; and cannot be sustained as reasonable. Protestants contend that vendee under temporary authority is already conducting a service tantamount to regular-route service, and has instituted a trend which will inevitably result in a regular-route operation

utilizing the irregular-route rights of vendor. They argue that vendee has been providing a daily service, and is soliciting traffic on the basis of a daily pickup at St. Louis; that exhibits submitted at the hearing covering vendee's operations under temporary authority show that daily service has been rendered; and that trucks have been dispatched on a daily basis from Oklahoma City to St. Louis and Chicago almost without exception. Although the same type exhibit was not furnished covering shipments in the reverse direction, out of St. Louis and Chicago, since freight was picked up daily at those points, and trucks were coming back every day, they deemed it reasonable to assume that freight was also dispatched out of St. Louis and Chicago on a daily basis, arguing in support of such assumption that "what goes up must come down"; otherwise all of the trucks would end up in Chicago. They also argue that the new operation will be completely intertwined with the present operation of vendee, and soon, if not already, the two will be indistinguishable. They further assert that the interested shippers presently have service on a daily basis with expeditious movements between points in vendee's present territory, on the one hand, and St. Louis and Chicago, on the other, and that such parties are not interested in vendee rendering a once- or twice-a-week service on a spasmodic call-on-demand, "catch as catch can" basis for less-than-truckload traffic; that none of the shipper witnesses would so testify, and none did; and that shippers of less-than-truckload freight want daily, expeditious, dependable, regular service, which is exactly the type of service vendee would have to give them to

operate successfully in vendor's territory.

Protestants also contend that the examiner's finding of dormancy did not go far enough to encompass all of the actual dormancy, and argue that approximately 95 percent of vendor's southbound traffic was delivered at Oklahoma City and Tulsa, with the remaining 5 percent, mostly truckload traffic, destined to a limited number of points, and that no need has been shown for the reactivation of any dormant portions of vendor's operating rights, which the examiner recommended be cancelled.

Protestants further assert that neither vendee nor vendor, singly or in combination, were considered competitive to or from any Illinois point or St. Louis, and argue that vendor's local service operations, handling traffic almost exclusively to and from Oklahoma and Texas would be expanded into a single-line transcontinental operation connecting Chicago and St. Louis with the Pacific coast area, Phoenix and Tucson, Ariz., El Paso, Tex., and numerous southern traffic centers; that there is an abundance of available single-line or single-system carriers competing for traffic between all of the important traffic centers affected by this proposal, and approval here would place in existence an entirely new and additional competitive operation in traffic fields already overcrowded. They also urge that the examiner was impressed more by the number of witnesses than by what they said; that the witnesses offered by applicants failed to establish any inadequacy in the presently available service or to demonstrate any real need for the operation proposed by vendee; and that, in fact, most witnesses expressed

satisfaction with existing service including that of protestants, and were more interested in vendee's lower rates and the fact that its nonunion drivers would cross picket lines.

Protestants maintain that there was a startling change in the pattern of operations subsequent to the commencement of temporary operations by vendee, which bore no resemblance to the operations conducted prior thereto; that the increased traffic now being handled by vendee has been diverted from existing carriers to the point where vendee is now a strong competitive factor in traffic moving between its authorized territory and that of vendor; that the past unprofitable operations of both vendee and vendor can only be made profitable by the conversion of vendor's irregular-route operations to regular-route and the continuing diversion of traffic from existing carriers; and that unless an appropriate restriction against the joinder of the two sets of rights for the purpose of performing a through service is imposed, the unified operations would have no resemblance to the operations heretofore conducted by applicants in conjunction with themselves or with others.

The union takes exception to the examiner's recommended approval of the transaction, in light of his finding that the vendee was only willing to accept the former employees of vendor on a nonunion basis, and contends that this not only constitutes a refusal to protect the employees' interests, but even amounts to active cooperation with vendee in the flouting of the national labor policy, namely that employees shall be protected in the right of self organization, to join,

form and assist labor organizations and to engage in collective bargaining. It asserts that in mid-1962 vendee began negotiations to purchase vendor's operations, but by the contract finally signed on January 28, 1963, ostensibly purchased only the bare operating rights. In this connection, it argues that when the total fact situation, involving as it does the use of the legal device of a lease by the son as guardian to himself as operator, is weighed, it becomes apparent vendor is seeking to obtain $250,000 for the enterprise while leaving the employees unpaid, their pension and welfare trusts likewise unpaid, and relegating creditors to the bankruptcy court. It is to the son that creditors must look, it asserts, while the mother receives a windfall, unencumbered by laborers' liens or other creditors' rights. The Union further asserts that to effectuate this scheme it became necessary to convince the Commission that vendor had no employees, which representation was wholly false, because on February 1, 1963, the date of the application, vendor had a full complement of employees who were not terminated until February 6, 1963. It argues that applicants have, in effect, sought to picture a going enterprise as nothing more than bare operating rights, and seek approval of their transfer while the employees are relegated to the bankruptcy court with claims against an individual who asserts that he has no assets, and that such transactions require the most careful scrutiny in order that public interest may be vindicated, and the Congressional intent, to effect fair and equitable treatment of employees, implemented. The union further urges that it is neither in the public

interest, nor in the interest of the affected employees, to approve a transaction by which a carrier losing money is made profitable at the expense of competing carriers and employees, and argues, that if the transaction is approved it should be conditioned upon payment of the unpaid wages, health, welfare and pension benefits, and conventional protections applied to vendor's employees.

In their reply, applicants contend that the protestants' argument that the purchase price is excessive, in view of applicants' deficit operations, fails to take into consideration the fact that vendee was beset with labor troubles during the years 1960 to 1963, and that vendor had suffered unusual financial difficulties during the last two years of operation. The operating economies which would result from vendee's operation under the vendor's operating rights, they assert, alone justifies the purchase price, not to mention the increase in revenues and earnings that would be realized from the recovery of a portion of the traffic lost by vendor due to acquisitions and mergers by other carriers in the general areas involved. They also assert that until labor problems developed vendee enjoyed extremely profitable operations, and with settlement of those difficulties the profits which will accrue from operations under the unified operating authorities will make the purchase price extremely reasonable; and that payment of the purchase price will not only have no adverse effect upon the capital structure of vendee, but in fact will hardly make a dent in its assets.

In connection with the conversion of vendor's irregular-route authority to regular-route, applicants

argue that in each of the decisions relied upon by protestants the facts are distinguishable. In these cases, the conversion of the irregular- to regular-route operations was inevitable or the vendee expressed an intention, either by the proposed method of operation or by conducting regular-route operations under temporary authority, of making conversion inevitable, or were cases where it was impossible as a practical matter to maintain operations on an irregular-route basis, none of which conditions exists here. They argue that the fact that operations conducted by vendee under the vendor's rights might have some of the characteristics of regular-route operations does not necessarily mean that the general character of irregular-route operations is not being maintained, and point out that during vendee's two years of operations under temporary authority none of the protestants has filed a complaint alleging that it has converted vendor's irregular-route operations to regular-route. They assert that if operating conditions, the flow of traffic, and the general requirements of the public for movement of traffic cause a sufficient drift toward a regular-route operation, vendee would properly apply for authority to convert the acquired operating rights to regular-route authority. They argue that despite the fact that freight bills were cut every day, the evidence indicates that there were several days when no schedules were dispatched and several when more than one schedule was dispatched, all of which points to irregular schedules and irregular service characteristic of irregular-route operations. They further argue that protestants have failed to establish that there has been

or will be an unlawful conversion of vendor's irregular-route operating authority, and that the transaction should not be denied merely because there is involved the acquisition of irregular-route authority which will be tacked to regular-route authority.

On the question of dormancy, applicants assert that vendor performed service coextensive with the scope of the operating authority when traffic was available; and that the evidence clearly indicates that the operations under vendor's authority which the examiner found had not become dormant have been substantial and continuous. They aver that where a carrier has been conducting substantial operations, it need not submit evidence of operations to and from every authorized point to establish that its operations as a whole have been continuing and are of a substantial nature.

It is acknowledged that while the record shows that there were periods in which vendee discontinued part of its interchange relation with vendor because of the latter's financial difficulties, vendor was for several years the principal interchange carrier of vendee on traffic moving to and from points in the vendor's territory and beyond; and protestants would only be faced with the improvement of an existing service rather than a new service. They argue that it is difficult, if not impossible, to conceive that approval of the transaction would have a resulting destructive adverse effect upon protesting carriers when such protestants have been operating in competition with vendee's operations of the unified rights under temporary authority for two years, during which their tonnages and re-

venues have increased and their operating ratios have generally improved.

Applicants also contend that while protestants have submitted some figures on the tonnage subject to diversion they have apparently maintained their level of service and have been able to meet any intensified competition thus far, and there is nothing in the instant record under which the Commission would be justified in imposing a restriction against tacking as to traffic to and from the west coast. They assert that the shipper support of the application was based on a desire for improved service, rather than a desire for lower rates as contended by protestants, and that if shippers and receivers of freight can avail themselves of a carrier offering lower rates, it is in the public interest to enable them to do so through approval of the transaction.

In reference to employees, applicants contend that if vendee is guilty of any unfair labor practice the National Labor Relations Board is the proper place to seek relief for the union employees; that if vendee had taken over the operations of vendor as a going concern there might be some obligation, but it is merely purchasing bare operating rights from their owner and has no obligation to the employees of W. Thurman Shayler, the former lessee, who became bankrupt and terminated such employees; that vendee did not refuse to employ the former employees of W. Thurman Shayler but rather came to a parting of the ways with them when it refused to be saddled with the employment contract entered into by W. Thurman Shayler and the union; and that neither vendee nor

Clarinda K. Shayler had any dealings with the union or the employees and should not be penalized by being held responsible for the legal rights, if any, of the employees against W. Thurman Shayler.

Applicants finally argue that approval of the application would make available an improved single-line and better coordinated service between points in the considered areas, with better tracing and claim service, less handling of traffic, less damage and loss, and reduced exposure to damage and loss; that any traffic diverted from protestants would not impair their efficiency or ability to provide service if they continue to maintain a high level of service; and that the volume of freight handled by vendee under the temporarily unified rights has steadily increased, indicating that the service is fulfilling a desire or need for vendee's service.

Before progressing to other issues we will first dispose of the question concerning employees. The history of vendor's operation was adequately set forth in the examiner's report. However, for the purpose of understanding, it will be briefly restated. In 1946, Warren G. Shayler was declared incompetent; his son, W. Thurman Shayler, was appointed guardian, and conducted his father's motor carrier operation. The elder Shayler was subsequently declared competent, then again incompetent, and on December 15, 1961, passed away. During all this period, W. Thurman Shayler conducted the motor carrier operation, part of the time prior to 1956 with the aid of a partner, but thereafter as an individual, as lessee, from himself, as guardian. By order of December 6, 1961, in No. MC-

FC-35368, W. Thurman Shayler was authorized to extend said lease for an additional period of 5 years, commencing January 8, 1962, at a monthly rental of $1,000. During the year 1962 revenues declined to such a point that W. Thurman Shayler was unable to meet his insurance and lease rental payments. In January 1963, he was notified that his insurance would be cancelled effective February 6, 1963. On January 13, 1963, Clarinda K. Shayler, mother of W. Thurman Shayler, and executrix and sole legatee of the estate of Warren G. Shayler, sought and was granted authority by the appropriate court to cancel the lease held by her son, and to sell or do whatever was necessary to protect the value of the operating rights. On February 4, 1963, Mrs. Shayler notified her son that the lease would be cancelled effective February 6, 1963. On February 5, 1963, W. Thurman Shayler notified the union of his inability to continue the operation, and discontinued operations at the close of business the same day. In June of the same year, W. Thurman Shayler filed a petition in bankruptcy, and listed among the claims of creditors, wages due employees of $12,021, and $4,586 due to the union health, welfare and pension fund.

We have on numerous occasions stated that the act, taken as a whole, makes clear the Congressional intent that public policy demands fair and equitable treatment of employees of motor carriers involved in section 5 proceedings. We cannot accept applicants' argument that the only thing involved here is the purchase of bare operating rights, and that the National Labor Relations Board is the only proper place for the em-

ployees to seek relief from the effects of this transaction. Section 5(2)(c)(4) of the act provides that in passing upon any proposed transaction under the provisions of section 5(2) we shall give weight to the interest of the carrier employees affected. In applying the provisions thereof, jurisdiction has been reserved in a number of instances where doubt existed as to what, if any, adverse effect consummation of the transaction there considered would have upon employees. However, in a number of cases where a definite showing was made that certain employees have been or would be adversely affected as a result of the proposed transaction, we have prescribed conditions for their protection. See *Watkins Motor Lines, Inc.-Control and Merger*, 90 M.C.C. 567, and the cases cited herein.

In response to exhibit D-5 of the application, applicants stated:

> The transferor has no employees. The operations of W. Thurman Shayler under the certificates here involved has or will cease, and all employees will have been discharged. Under all of the circumstances the transaction in itsef will have had no effect upon any employees of W. Thurman Shayler, and, therefore, it is urged that the Commission under section 5 is not required to give weight or consideration to the employees of W. Thurman Shayler.

As indicated above, W. Thurman Shayler conducted operations under the considered rights until their abrupt discontinuance on February 5, 1963, or beyond January 28, 1963, the date of the execution of the

contract of sale between vendee and Mrs. Shayler. Applicants are technically correct in declaring that Mrs. Shayler had no employees. We cannot, however, because of a technicality close our eyes to the fact that there were "carrier" employees involved, and the conclusion is warranted that those employees were adversely affected as a direct result of this transaction. The questions of the contractual obligations of the parties under the union agreement, and as to whether the employees are entitled to payment of unpaid wages, and the union to payment of the health, welfare and pension benefits are properly matters to be determined by the parties or the courts, and a determination of the validity of such claims by this Commission would be improper. However, to the extent that any of the employees of W. Thurman Shayler did not find full-time employment following their dismissal, we are of the opinion that they should be afforded protection in the form of the condition hereinafter imposed.

We find that any employee of W. Thurman Shayler separated from his position on or after January 28, 1963, should receive for the period in which he remained unemployed following the separation, but for a period not to exceed 3 months, severance pay from Clarinda K. Shayler at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, provided, however, that the severance pay of any dismissed employee who was otherwise employed during the 3-month period shall be reduced by the amount of his total wages earned during the period in such other employment,

including unemployment benefit payments received under any unemployment insurance law. In the event that any dispute or controversy arises with respect to the protection herein afforded which cannot be settled by the parties, it may be submitted to arbitration.

We have on numerous occasions stated that there is no fixed formula for determining whether the purchase price is reasonable. A carrier's earning record is not the sole criterion by which to determine the reasonableness thereof, and this is especially so where, as here, the record indicates that vendor was operating with insufficient capital, which added to operating difficulties, and that vendee was hampered by labor difficulties. Here the vendee would acquire the right to serve a territory including the St. Louis, Mo.-East St. Louis, Ill., and Chicago commercial zones, both densely populated and highly industrialized, and in addition to the traffic it would generate over these new operating rights local to its own lines, it would be in a position to develop interline arrangements with the numerous carriers serving those areas. Exhibit No. 44, submitted at the hearing, indicates that vendee, under temporary authority, during the period of March 20, through September 30, 1963, handled 7,302 shipments, weighing 10,590,266 pounds, from and to points authorized to be served by vendor, and it is reasonable to expect that increased solicitation and familiarization with the territory would enable it to generate additional traffic. The premises considered, we find that the purchase price is neither improvident nor unreasonable.

Protestants' objections to the unification of applicants' operating rights, on the ground that the irregular-route operations of vendor will be converted to a regular-route operation are indeed most strenuous. However, it was stated in *Gordons Transports, Inc.-Control and Merger*, 80 M.C.C. 729, and prior cases, that—

> ***it must be presumed here that applicant, in operating under the unified rights will maintain such operations within the scope of the confirmed operating authority. *Thurston-Purchase-Merritt*, 15 M.C.C. 358. Moreover, until vendee has conducted such unified operations for a period sufficient to permit a determination that they do or do not conform to the operating authority possessed, any conclusion in the premises would be premature.

As in the *Gordons* case, operations under the unified rights here will determine the type of service vendee will provide, and considering that vendee has been conducting operations under the considered rights for over two years, pursuant to temporary authority, without complaint, it must be presumed that the irregular-route operation of vendor has not been unlawfully converted to a regular-route operation. Protestants' argument that vendee's practice of making daily pickups was indicative of the conduct of a daily service is not sustained by an examination of exhibit No. 44, covering vendee's operations under temporary authority. Rather the exhibit discloses that on many of the days covered the aggregate pickup was well below a truckload, and its movement that day would not have

been economically feasible. Vendee is not new to the field of motor carrier transportation, and is aware of the distinction between irregular- and regular-route service, and until concrete evidence to the contrary is presented, we must presume that its operations are being lawfully conducted.

Numerous claims regarding the service or lack thereof by vendor have been advanced, the principal of which is that vendor's operations were limited to service between Chicago, St. Louis, Tulsa and Oklahoma City. The abstract of shipments submitted with the application, covering the months of July and December 1962, and one week in each of the intervening months, lists over 6,000 shipments handled during the period. While merely representative, the abstract covers a sufficient period of time to give a clear picture of the operations performed by vendor, and indicates that a substantial service has been performed to points in and surrounding the Chicago, and St. Louis, Mo.-East St. Louis, Ill., commercial zones and throughout the State of Oklahoma. Ordinarily we withhold approval of the transfer of dormant irregular-route rights, only where the evidence clearly shows that service to or from particular areas has been abandoned or discontinued for substantial periods of time and evidence showing a need for reactivation of the rights by the acquiring carrier is either not presented or if presented, is not convincing. We have, on numerous occasions, stated that an irregular-route carrier is only required to submit evidence showing that it has rendered substantial service to a representative number of points within its authorized territory in order to

support the conclusion that its operations have been substantial and continuous. Compare *New Dixie Lines, Inc.-Control-Jocie Motor Lines, Inc.* 75 M.C.C. 659, and *Virginia-Carolina Frt. Lines, Inc.-Control-Burlington*, 87 M.C.C. 341. In our opinion, the evidence of shipments transported under the rights involved, including, as it does, evidence of shipments in direct service, to or from such diverse points as Alton, East Alton, Collinsville, Genoa, DeKalb, Sycamore, Aurora, Plainfield, Joliet, Frankfort, Batavia, and Wheaton, Ill., and Guymon, Beaver, Elk City, Altus, Temple, Ardmore, Idabel, Broken Bow, Wilburton, Enid, Miami, Wynnewood, Blackwell, Bartlesville, and Muskogee, Okla., as well as numerous other points, is sufficiently representative to show that a substantial and continuous service was performed under such authority throughout Oklahoma, and from points in Cook, DeKalb, DuPage, Kane, Lake, and Will Counties, Ill., and that portion of Madison County, Ill., authorized to be served by vendor.

In establishing the service provided by vendor, the exhibits submitted with the application and at the hearing, clearly depict the operations performed in conjunction with connecting carriers, and the operations which would result from unconditioned approval of the transaction. Exhibit No. B-7 which, as indicated above, covers over 6,000 shipments, shows that vendor handled a total of only 13 shipments which originated at, or were received from connecting carriers at Chicago, Oklahoma City, or St. Louis, having origins or destinations in Arizona and California. Of these, 3 shipments, with an aggregate weight of 14,394 pounds

were destined to California points, 9 shipments with an aggregate weight of 2,982 pounds were originated in California, and one shipment weighing 315 pounds was originated at Tucson, Ariz.

Depicting the traffic interchanged between applicants, exhibit No. 38, shows that for the year 1962 vendor gave shipments totaling 3,704,781 pounds to vendee, and received from vendee shipments weighing 228,466 pounds. Of these, a single shipment weighing 357 pounds was destined to California, 4 shipments with a combined weight of 1,397 pounds originated at Tucson, 6 shipments with a combined weight of 1,212 pounds originated at Phoenix, and 10 shipments with a combined weight of 3,285 pounds originated at California points. These shipments represent the traffic interchanged by applicants during the month of May 1962, (the only month abstracted in the exhibit). However, they represent 23.1 percent of the total traffic given by vendor to vendee, and 18.3 percent of the traffic received from the vendee, for the entire year. The exhibit also shows the traffic interchanged by applicants during the month of September 1960, which indicates that for that month applicants interchanged 10 shipments originated at or destined to points in California, and 3 shipments originated at or destined to points in Arizona. However, this traffic is too remote to merit consideration. See *Illinois-California Exp. Inc.-Pur.-Salt Lake Kanab*, 97 M.C.C. 38. This exhibit further shows that traffic was originated or destined to approximately 123 points in Texas, covering all areas of that State.

Exhibit No. 40, covering approximately 60 days in 1962, (May and June, with some July traffic included) shows that vendor transferred 668,213 pounds of traffic to 22 connecting carriers at Oklahoma City and Tulsa, and received 72,511 pounds from 9 carriers at those points. None of this traffic was originated at or destined to points in Arizona or California.

Exhibit No. 44, depicting the traffic handled by vendee under the vendor's operating authority from March 20, 1963, through September 30, 1963, under temporary authority, shows a startling change in the operating pattern, compared to that previously conducted by vendor, in connection with vendee or with other connecting carriers. This exhibit indicates that during this period vendee transported, under the vendor's operating authority, 3,313 shipments weighing 4,333,739 pounds which originated at or were received from connecting carriers at Chicago; 1,977 shipments weighing 2,914,107 pounds which originated at or were received from connecting carriers at St. Louis; 1,013 shipments weighing 1,919,141 pounds destined to Chicago or points beyond; and 999 shipments weighing 1,423,279 pounds destined to St. Louis or points beyond a total of 4,326 shipments weighing 6,252,880 pounds moving to or from Chicago, and 2,976 shipments weighing 4,337,386 pounds moving to or from St. Louis, or an aggregate total of 7,302 shipments weighing 10,590,266 pounds moving to or from Chicago and St. Louis. Moving from Tucson were 54 shipments with a combined weight of 47,198 pounds to Chicago, and 3 shipments weighing 509 pounds to St. Louis; from Phoenix 8 shipments weigh-

ing 1,638 pounds to Chicago; and 7 shipments weighing 1,286 pounds to St. Louis; from California 225 shipments weighing 55,061 pounds to Chicago and 351 shipments weighing 94,621 pounds to St. Louis. Moving to Tucson were 33 shipments from Chicago and 7 from St. Louis; to Phoenix 106 shipments from Chicago and 2 from St. Louis; to other Arizona points 26 shipments from Chicago and 7 from St. Louis; and to California 383 shipments from Chicago and 47 from St. Louis. Similar to the exhibits covering operations of the vendor, exhibit No. 44 shows a substantial flow of traffic to and from points in Texas.

Contrary to the arguments of certain protestants, the evidence conclusively shows that there have been continuous and substantial operations by applicants in connection with traffic moving from and to points in Texas in conjunction with one another, and with other connecting carriers, and that the single-line service which would be instituted by vendee under the unified rights would be new only to the extent that the former interline with vendor would be eliminated. It is probably true that the unified operation will cause, and the operations under temporary authority no doubt have already caused, some readjustments in the competitive relations of the carriers, and an intensification of competition between points in Texas and points in the territory of vendor, but this almost always occurs when the purchasing carrier is stronger than the selling carrier, and we are not convinced that any of the protestants would be unable to meet the added competition without serious impairment of their existing services. Compare *Interstate Motor Lines*,

Inc.-Control and Merger, 58 M.C.C. 775.

Evidence of the scope of vendor's operations in connection with traffic interlined from and to Arizona and California points indicates that such traffic constituted an infinitesimal part of vendor's total operation, and was of no competitive significance to protestants or other carriers in the area. On the other hand, vendee, in just six months, under temporary authority, has built a substantial operation to and from Arizona and California points, and because of its stronger financial condition, and ability to perform a single-line service to and from points in vendor's territory, can reasonably be expected to continue, and in all likelihood increase, the amount of traffic now being handled under temporary authority. In an attempt to show that protestants will not be adversely affected by the transaction, applicants request that we consider certain data relating to the operations of protestants since the completion of the hearing. This data is not of record and will not be considered in disposing of the issues here present. Compare *Wheaton Van Lines, Inc.-Purchase-Carleton*, 65 M.C.C. 781. It is clear, on the evidence before us, that the service proposed by vendee from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are entitled to protection from the establishment of additional competition. Where the institution of a new service is proposed, applicants must show a need therefor, and may

not escape this required showing by contending that protestants have not submitted positive proof of diversion of specific traffic as a result of the proposed transaction. See *North American Van Lines, Inc.-Pur.-Hagerstown Motor*, 93 M.C.C. 125. On numerous occasions we have stated that restrictions on operating rights create undesirable complications, and should be imposed only when the record conclusively shows that a restriction is necessary in the public interest. In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California, and our findings will be conditioned accordingly. Compare *Consolidated Copperstate Lines-Purchase-Nielsen*, 90 M.C.C. 483. Except for cancellation of those portions of vendor's rights found to be dormant, and the above-mentioned restriction, the evidence establishes that the service proposed by vendee would be consistent with the public interest.

We find, (1) in Finance Docket No. 22543, that the application should be dismissed, and (2) in No. MC-F-8358, that the purchase by Braswell Motor Freight Lines, Inc., of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), and the acquisition by J. V. Braswell of control of the operating rights through the purchase, on the terms and conditions above set forth, and in the examiner's report, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent

with the public interest, and that if the transaction is consummated, Braswell Motor Freight Lines, Inc., will be entitled to operate under the rights confirmed in No. MC-70380 and Sub-Nos. 1 and 2, which rights are herein authorized to be unified with rights otherwise confirmed in it, and to be embraced in a certificate to be issued in its name; provided, however, that the operating authority acquired from Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix) shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for the purpose of providing single-line service to or from points in Arizona and California; and provided, further, that coincidentally with consummation of the transaction herein authorized, that portion of the operating rights purchased by Braswell Motor Freight Lines, Inc., authorizing the transportation of general commodities, with exceptions, from points within a defined area of Illinois to points in Oklahoma, described in No. MC-70380, shall be cancelled, except to the extent that it authorizes service from points in Cook, DeKalb, DuPage, Kane, Lake and Will Counties, Ill., and that portion of Madison County, Ill., authorized to be served by vendor, to points in Oklahoma; and provided, further, that any employee of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), separated from his position on and after January 28, 1963, shall receive for a period of not more than 3 months, severance pay from Clarinda K. Shayler at the rate of his average monthly pay for the 12 months immediately preceding the month of January 1963,

said payments, however, to be reduced by the amount of his total wages earned during the period in which he was otherwise employed during the 3 months, including unemployment benefit payments received under any unemployment insurance law; and provided, further, that in the event of any dispute or controversy arising with respect to the protection afforded by the foregoing condition, which cannot be settled by the parties, or their authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the parties or their authorized representatives.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 20th day of December A. D. 1965.

No. MC-F-8358

BRASWELL FREIGHT LINES, INC—PURCHASE —WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Finance Docket No. 22543

BRASWELL FREIGHT LINES, INC.—NOTES

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the examiner, are hereby made a part hereof:

It is ordered, That the application in Finance Docket No. 22543 be, and it is hereby, dismissed.

It is further ordered, That the purchase by Braswell Motor Freight Lines, Inc., of El Paso, Tex., of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), of Oklahoma City, Okla., and the acquisition by J. V. Braswell, also of El Paso, of control of the operating rights through the purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and rules and regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, if the authority herein granted is exercised, Braswell Motor Freight Lines, Inc., shall submit for consideration, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired, and liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that this order shall be effective 30 days from the date of service hereof.

It is further ordered, That, unless the authority herein granted is exercised within 90 days from the effective date hereof, this order shall be of no further force and effect.

It is further ordered. That recital in said report of balance sheet and other financial data shall not be con-

strued as approving accounting methods which have been followed, or expenditures represented thereby.

And it is further ordered, That effective with consummation of the transaction herein authorized, or 90 days from the effective date hereof, whichever first occurs, the authority granted by the order of February 25, 1963, as extended by order of July 17, 1963, and amended by supplemental order of July 16, 1964, for temporary operation of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), shall be of no further force and effect.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION
Served December 29, 1964

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

No. MC-F 8358[1]

BRASWELL FREIGHT LINES, INC.—PURCHASE —WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Decided .....

[1]This report also embraces Finance Docket No. 22543, Braswell Freight Lines, Inc.—Notes.

1. In No. MC-F 8358, purchase by Braswell Motor Freight Lines, Inc., El Paso, Texas, of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, Oklahoma City, Oklahoma, and acquisition by J. V. Braswell of control of the operating rights through the purchase, approved and authorized, subject to condition.

2. In Finance Docket No. 22543, application of Braswell Motor Freight Lines, Inc., to issue an unsecured note in the amount of $200,000, bearing interest at the rate of 4 percent per annum, dismissed.

M. Ward Bailey and *Dean Williamson*, for applicants.

Adolph Bieberstein, Richard H. Champlin, Morris G. Cobb, Donald L. Cooper, Wentworth E. Griffin, G. F. Gunn, Jr., O. Russell Jones, Robert M. Kaske, Hugh T. Matthews, Lloyd M. Roach, Phillip Robinson, Carl L. Steiner, and *Robert W. Wright, Jr.* for protestants.

L. N. D. Wells, Jr., for labor organizations, protestant.

REPORT AND ORDER

RECOMMENDED BY JAMES F. PERRIN, HEARING EXAMINER

By joint application filed February 11, 1963, Bras-

well Freight Lines, Inc.[2] (Braswell Freight), El Paso, Texas, seeks authority[3] to purchase the operating rights of Warren G. Shayler, Deceased (Shayler Rights) from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate (seller), Oklahoma City, Oklahoma, for $250,000. By the same application, J. V. Braswell, and Braswell Motor Freight Lines, Inc. (Braswell Motor) seek authority to acquire control of the Shayler Rights through the transaction.

Braswell Freight operates in excess of 20 motor vehicles in performing transportation in interstate and foreign commerce subject to Part II of the Act.

In a related application filed April 1, 1963, cited in footnote 1, ante, Braswell Freight sought authority under section 214 of the Act to issue its unsecured installment promissory note for the sum of $200,000 payable in five equal annual installments, the first installment being due and payable one year from date of consummation, and a like installment due and payable each year thereafter until the full amount, both principal and interest, has been paid, said note to bear interest at the rate of 4 percent per annum on

[2]By order of the Commission in No. MC-F-8655, dated May 5, 1964, merger of Braswell Freight Lines, Inc. into Braswell Motor Freight Lines, Inc. for ownership, management and operation, and acquisition of J. V. Braswell of control of the operating rights and property through the merger were approved and authorized. The transaction was consummated July 1, 1964, and by supplemental order, in the title proceeding, dated July 16, 1964, Braswell Motor Freight Lines, Inc. was substituted as vendee in lieu of Braswell Freight Lines, Inc., and as lessee of the properties of Warren G. Shayler, Deceased, Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate.

[3]The authority is sought under the provisions of section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2).

the unpaid balance. Payment may be accelerated. At the hearing, Braswell Freight requested authority to (1) amend the section 5 application to show that payment for the Shayler Rights would be in cash, and (2) dismiss the section 214 application.

By another related application under section 210a (b), Braswell Freight sought authority to assume temporary control of the Shayler Rights at a total monthly rental of $250, pending final determination of the section 5 application. By order dated February 25, 1963, as extended July 17, 1963, temporary control was authorized and temporary control was commenced March 18, 1963.

Hearing on the applications was held in Oklahoma City, Okla., November 4 to 15, inclusive, 1963. The applications were opposed by 25 motor carriers[4], the Class I Rail Carriers in Western District, and both the Central Conference of Teamsters and Teamsters Local Union No. 710.

Briefs have been filed.

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[4]Be-Mac Transport Company, Inc., (Be-Mac); Campbell Sixty Six Express, Inc., (Campbell); Consolidated Forwarding Co., Inc., (Forwarding); Consolidated Freightways Corporation of Delaware (Freightways); Denver-Chicago Trucking Company, Inc. (Denver); East Texas Motor Freight Lines, Inc. (Texas); Fortier Transportation Company (Fortier); General Expressways, Inc. (General); Gillette Motor Transport, Inc. (Gillette); Illinois-California Express, Inc. (ICX); Interstate Motor Lines, Inc. (Interstate); Knox Motor Service, Inc. (Knox); Lee Way Motor Freight, Inc. (Lee Way); Missouri Consolidated Freightways (Missouri); Navajo Freight Lines, Inc. (Navajo); Pacific Intermountain Express Co. (PIE); Ringsby Truck Lines, Inc. (Ringsby); Roadway Express, Inc. (Roadway); Southwestern Transportation Company (Southwestern); Texas-Arizona Motor Freight, Inc. (Arizona); Transcon Lines, (Transcon); Viking Freight Company (Viking); Voss Truck Lines, Inc. (Voss); Watson-Wilson Transportation System, Inc. (Watson); Western Truck Lines, Ltd. (Western).

Preliminary Rulings

Objections were made at the hearing and renewed on brief to testimony[5] of the seller. Objection to statements 1(a) through (d) inclusive, was that the witness was not qualified to make the statements because she knew nothing about the actual conduct of the

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[5]1(a) "My husband conducted his trucking business under the above certificate and I was, in fact, a housewife." ***

(b) "My son, W. Thurman Shayler, was appointed Guardian and operated the business as such." ***

(c) "They [W. Thurman Shayler and a partner Mr. Barnett] conducted the operations until approximately 1956." ***

(d) "In all this time a stated monthly rental was paid from the operations to the Guardian who advanced funds to Mr. Shayler and myself for living." ***

2(a) "Business conditions for my son were bad and he became unable to make payments as required under the lease. In January of 1963 I became aware of the fact that the insurance covering the operations was being cancelled as of the 6th of February. My son advised me that he did not have the funds with which to keep insurance. He was, in fact, broke and unable to continue to operate the business." ***

(b) "My attorneys, Looney & Watts, advised me that the Estate cannot be closed and the certificate or title to certificate distributed to me at this time since some creditors of my son's in his operations of authorities have filed a suit against me over a debt. This is pending and I am told the laws of the State of Oklahoma will not permit the closing of an Estate for the distribution of the assets prior to the settling of all claims or litigation involving the Estate." ***

(c) "I will inherit certain small building and loan accounts. However, the inheritance taxes will exhaust this amount. Other than this I have no assets, and will be without funds excluding only the value of these motor carrier certificates. I ask that the Commission approve the sale as herein proposed since the authority not only represents my husband's life's work, but also represents the only asset capable of maintaining and keeping me during my remaining years. A denial would result in the authority being returned to me, and I would be absolutely unable to operate it. I would not have the funds to acquire the necessary equipment, and I would be unable to serve the public. It is my request that the *** Commission approve this proposed sale since it will provide a continuation of service for the public and will provide from the purchase price funds for me to live and not have to worry or go through the uncertainty which I have been placed in the past."

business. It is quite possibly true that she knew nothing of the conduct of the business of the Shayler Operation, but these statements had nothing to do with the conduct of the business. This information would come to her in the normal course of her relationship as wife of the original owner of the property, and as mother of the subsequent operator of the property. The witness was competent to testify, the testimony was material, relevant and competent. Its admission was proper.

Hearsay objection was made at the hearing and renewed on brief to statement 2(a). Information in the first, third and fourth sentences are admissable to show that the statements were made not to show their truth or falsity. *Michaud's Bus Line, Inc., Extention —Salem, Mass.*, 67 M.C.C. 711. The second sentence has nothing to do with the hearsay rule since she was testifying to a matter within her own personal knowledge. The ruling of the examiner was not improper.

Statement 2(b) was said to be hearsay, immaterial and irrelevant and the examiner should have granted protestants' motion to strike.

Objection to statement 2(c) was that it is immaterial, irrelevant and merely an attempt to invoke sympathy. Stripped of promotional coloring the seller is merely giving her reasons for disposing of the Shayler Rights. It is relevant, material and competent. Its admission was proper.

Objection was made at the hearing, and renewed on brief, to the operating ratio of Braswell Motor and all reference to that carrier in Exhibits H-12

through H-24, sponsored by V. E. Hensley, Comptroller for both Braswell Freight and Braswell Motor, because the latter (1) was not party to the proceeding, (2) no testimony was introduced that it was assuming or guaranteeing any of the obligations of Braswell Freight, (3) did not sign the contract of sale or the application, and (4) no minutes showing that it participated in the transaction. All of the capital stock of the applicant Braswell Freight is owned by Braswell Motor, which in turn is controlled by J. V. Braswell through ownership of its capital stock. Braswell Motor and J. V. Braswell jointly seek to control the Shayler Rights through the transaction under consideration. The sponsoring witness is comptroller for both the applicant and parent company. Exhibit A to the application calls for information, among others, respecting the person or persons controlling the transferee. This constitutes evidence under § 1.5(d) and § 1.19 of the General Rules of Practice before the Commission. Evidence on this matter is both relevant, material and competent. The ruling of the examiner was proper. Since the applicant has been merged into the parent company this matter is moot.

Protestants made a motion to strike the two sentences[6] recited below because V. E. Hensley, comptroller for both Braswell Freight and Braswell Motor,

[6]The management of Braswell Motor and Braswell Freight regard the operations as reflected in the financial data for the years 1958 through 1961 as being more representative of normal operations. The management of Braswell Freight and Braswell Motor feel that as soon as the labor difficulties and problems are solved, operations will return to normal and the tonnages, revenues and profits to be derived from operations will be at least the equivalent of that reflected in the financial data for the years 1958 through 1961.

was speaking for management and was not discussing anything in which he participated. This request was renewed on brief. In issue was the fact that Braswell Freight and the Shayler Operation had been losing money. The disputed testimony was an expression of management given by one of its top officers. Stating it in this manner saved repetition of this view by all the top officials from the President on down. However, the President of Braswell Freight did comment on this aspect in his prepared testimony. The witness was competent to testify on this matter and the testimony was germane to the issue. The ruling of the examiner was proper.

Objection to testimony[7] of protestant PIE was sustained and protestant requests reconsideration of the ruling. Interrogation of the witness by protestant's counsel disclosed that statement 1 came to the attention of the witness in the normal course of business from its Chicago office, which had obtained it from

[7] 1. Yes. We fear that some of the traffic will be diverted because of the payment by Braswell of a higher diversion to connecting lines, and the connecting line business is a very important business to our company where Braswell uses the Jeffries division sheet in the Chicago area where we conform to the transcontinental division sheets, as do our long-line competitors, as ICX, Denver-Chicago and those carriers, and also the payment of a higher local cartage to local cartage companies that perform pickup service at the various points within the Chicago Commercial Zone and short line points such as Elk Grove, Illinois and points in that area.

2. Speaking of rates, the fact that Braswell with the adoption of the Shayler tariffs, maintains lower rates into the Oklahoma area, the Southwest area formerly served by Shayler, has an influence on the transcontinental traffic due to the fact that the solicitors of Braswell, and rightly so, may approach a shipper on the basis that we're handling your freight at a lower rate into Oklahoma territory and therefore we want your transcontinental to make up the deficit, and I think that is definitely a probability in this proceeding.

Taylor Transfer, one of its Chicago connections. It is believed that it is offered to show that payment of higher divisions, and local cartage by Braswell may divert business from PIE. It is hearsay and its exclusion was proper.

Statement 2 is not proof of diversion of traffic by Braswell, but is fancied diversion, and its exclusion was also proper as opinion evidence.

Protestants request on brief, but they did not do so at the hearing, that the agreement in writing entered into between the seller and an unnamed individual, for the seller to pay this individual a finder's fee of about $12,000 for securing a purchaser for the Shayler Rights be made a part of this record. This information should have been submitted with the application. However, except for the name of the party,[8] the amount of the fee, and the fact that it was paid to an individual in Fort Worth who was not a member of the Braswell Freight was ascertained at the hearing. Its omission from the record is not fatal to the disposition of this proceeding and the request should be denied.

Background

The Shayler Rights emerged under the "Grandfather" provisions of the Motor Carrier Act of 1935. They were operated by the original owner until some time in 1946 when the original owner became ill and was adjudged incompetent. The son was appointed guardian of his father, the original owner, and the son operated the business as such. In 1948 the original

[8]It was probably a J. L. Hard who found the purchaser. Tr. 291-294.

owner was found to be competent, but the business continued under lease to the son, and a partner of the son, as a partnership. This lease was for a period of three years at a rental of $1,000 per month for the operating rights, plus regular unspecified payments on equipment. In 1949, the original owner was again ruled incompetent and the above partnership continued the lease through the son as guardian until 1958, when the partnership was dissolved due to ill health of the son's partner. The son thereafter conducted the business[9] as lessee from himself as guardian. The operating rights were again leased by the son from himself as guardian for an additional five years to begin January 8, 1962. The approval[10] of the Commission was dated December 6, 1961. The original owner died on December 15, 1961. On March 12, 1962, his wife Clarinda K. Shayler, who was named sole devisee and executrix under a will executed May 11, 1949, asked for letters testamentary and she was named executrix by the County Court of the County of Oklahoma, State of Oklahoma. The will was admitted to probate. The Shayler Rights which were leased to the son were the principal asset of the estate. The son continued to lease the Shayler Rights after the death of the original owner. Despite the efforts of the son to compete for traffic, and despite substantial financial assistance[11] from his mother Clarinda K. Shayler, the son's financial condition disintegrated to a point in 1962 where he was unable to pay the lease

[9]In No. MC-FC 35312 the operating rights were designated MC 116307.
[10]In No. MC-FC 35368 the operating rights were designated MC 116307.
[11]A loan of $22,000 evidence by a note, and the guarantee of an additional amount slightly in excess of $70,000.

rental on the operating rights and insurance. On January 4 and 7, 1963, the son was notified that his insurance would be cancelled effective February 6, 1963. Effort to obtain an extension of time for payment of insurance premiums was unavailing.

Because the lease rental was in arrears 13 months, because the lessee had extensive debt long past due which he was unable to pay, and because the value of the Shayler Rights was being placed in jeopardy, Clarinda K. Shayler on January 13, 1963, applied to the County Court of Oklahoma County for authority to cancel the lease of the Shayler Rights to her son the lessee, and sell the rights to Braswell Freight. The decree of the court issued the same day authorized cancellation of the lease, and authorized Clarinda K. Shayler, the seller, to do what was necessary to preserve the value of the certificate so as to preclude disruption of service, including the leasing of the Shayler Rights to another authorized operator. By letter dated February 4, 1963, Clarinda K. Shayler, the seller, notified her son that she was cancelling the lease effective February 6, 1963. Fifteen tractors and 33 trailers of the son, the lessee, were repossessed. Seven trailers leased by Clarinda K. Shayler, the seller, were returned to her.

The son, the lessee, notified the union by a letter dated February 5, 1963, of his inability to continue business and notified each employee individually of his condition. Operations over the Shayler Rights ceased as of the close of business on February 5, 1963. Some time in June, the son and former lessee of the Shayler

Rights filed a voluntary petition in bankruptcy, showing no assets, but listing among other claims, some $12,021.98 wages due employees, and $4,586 due the union health, welfare and pension fund. The son and former lessee of the Shayler Rights at the time of the hearing was managing a small restaurant in Oklahoma City. The son's conduct of the business under the Shayler Rights will hereinafter be referred to as the Shayler Operation.

Suggestions and inferences regarding claims against the seller, and the Shayler Operation have been made during the course of the hearing and in some instances on brief. These and other reasons form the basis for protestants' contention that the proposed sale of the Shayler Rights by the seller to Braswell Freight were not within the scope of section 5(2)(a) and would not be consistent with the public interest. Since the authority granted under section 5 is permissive only, any alleged claims against the properties involved must be settled between the parties, or by the courts. *Robert E. Sullivan—Purchase—Service Freight Line, Inc.*, 38 M.C.C. 621; *Wilson Storage & Transfer Co.—Purchase—Dakota Transportation, Inc.*, 36 M.C.C. 221 (223).

Vendee

Braswell Freight, a Delaware corporation, is a wholly owned subsidiary of Braswell Motor, which is in turn controlled through stock ownership of practically all of its outstanding capital stock, by J. V. Braswell. The latter as president, Hazel G. Braswell, and

H. J. Jones comprise the board of directors. Braswell Freight is authorized by certificate No. MC 1968[12] and certain subnumbered proceedings thereunder to operate as a common carrier by motor vehicle in interstate and foreign commerce of general commodities with exceptions, and certain specified commodities, over regular routes between Jackson, Miss., on the east and Dallas-Fort Worth, Tex., and Tulsa and Oklahoma City, Okla., on the west, and in addition its routes extend from New Orleans, La., on the south, through Jackson to Memphis, Tenn., on the north. It also holds some irregular route authority in and near Fort Worth. The parent company, Braswell Motor, by certificate No. MC 111383 subs 5, 6, 9 and 11 holds similar operating and commodity authority between Dallas-Fort Worth and Houston, Tex. and between those points and San Antonio, and El Paso, Tex., Phoenix, Ariz. and Los Angeles, Calif. In *Braswell Freight Lines, Inc., Extention-Atlanta*, 95 M.C.C. 457, decided July 1, 1964, Braswell Freight was authorized to operate as a common carrier by motor vehicle of general commodities, with exceptions, over a system of regular routes extending between Jackson, Miss. and Atlanta, Ga.

Some 25 terminals are operated. Their distribution by states is as follows: Arizona, two; California one; Louisiana six; Mississippi four; Oklahoma five; Ten-

[12]Braswell Freight is the successor to the operations formerly conducted by D. C. Hall Transport, Inc., acquisition of which was approved by the Commission on July 1, 1957, in No. MC-F 6154 and the related docket No. MC-F 6007. By order entered on the 24th day of April, 1959, the name of D. C. Hall Transport, Inc., was changed to Braswell Freight Lines, Inc.

nessee two; and Texas seven. A terminal is also maintained at Chicago, Ill. and St. Louis, Mo. through temporary control of the Shayler Operation. Commission agencies are maintained at Yuma, Ariz., Minden, La., Ardmore, Okla. and seven Texas locations.

Single leased wire teletype circuit connects all principal terminals of both companies and under temporary control has been extended to Chicago and St. Louis.

Some 650 pieces of equipment are used to conduct operations.

Braswell Freight and Braswell Motor have respectively 310 and 306 employees. Of these employees 75 and 73 respectively are line drivers.

A safety program is maintained under the direction of a full time safety engineer incorporating both inspection and promotion.

A full line of insurance is carried.

Braswell Freight conducts a regular route common carrier operation, providing pick up and delivery at its terminals, transporting both less-truckload (LTL) and truckload (TL). Braswell Motor and Braswell Freight combined hold out to perform (1) third morning delivery between Los Angeles, Calif., Phoenix, Tucson, and Yuma, Ariz., on the one hand, and on the other, Oklahoma City and Tulsa, also (2) first morning between Houston and Waco, Texas on the one hand, and, on the other, Oklahoma City and Tulsa. It has and does interlining with connecting carriers at Oklahoma City and Tulsa, including the Shayler

Operation. It also engages in trailer interchange with various connecting carriers, including the Shayler Operation. Soliciting of traffic is maintained and it has solicited traffic in conjunction with the Shayler Operation.

Braswell Freight and Braswell Motor participate in some 10 agency tariffs and each maintains an individual local tariff with reciprocal participation.

Vendor

The Shayler Rights sought to be transferred by the seller, Clarinda K. Shayler, are certificate No. MC 70380, and subs Nos. 1 and 2 thereunder. They authorize transportation as a common carrier by motor vehicle in interstate and foreign commerce of general commodities, with exceptions, over irregular routes (1) from Oklahoma City, Okla. and points and places within 125 miles of Oklahoma City, to points and places in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, as defined in 1 M.C.C. 656 and 2 M.C.C. 285, and to points and places in the Chicago, Ill. commercial zone as defined in 1 M.C.C. 673; (2) from points and places in the part of Illinois on and east of a line beginning at Alton, Ill., and extending along U. S. Highway 67 to Virginia, Ill., thence along Illinois Highway 78 to Kewanee, Ill., thence along U. S. Highway 34 to Junction, Illinois Highway 88, thence along Illinois Highway 88 to Sterling, Ill., thence along Illinois Highway 2 to Dixon, Ill., and thence along Illinois Highway 26 to the Illinois-Wisconsin State line, and on north and west of a line beginning at the Illinois-Indiana State line and extending along

Illinois Highway 9 to Gibson City, Ill. thence along U. S. Highway 54 to Junction, Illinois Highway 48, thence along Illinois Highway 48 to Junction U. S. Highway 66, and thence along U. S. Highway 66 to the Mississippi River at a point north of East St. Louis, Ill., also from points and places in Indiana within the Chicago, Ill. commercial zone as defined in 1 M.C.C. 673 to points and places in Oklahoma; (3) from points and places in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, as defined in 1 M.C.C. 656 and 2 M.C.C. 285, except points and places in Illinois in the aforesaid zone which are located on and north of U. S. Highway 66 to Oklahoma City, Okla. and points and places in Oklahoma within 125 miles of Oklahoma City. The transportation, over irregular routes, of carbide from Keokuk, Iowa, to points and places in Oklahoma, and the return of the empty containers is also authorized.

Agreement

By agreement dated January 28, 1963, the seller would sell to Braswell Freight the operating rights covered by certificate No. MC 70380, and subs 1 and 2 thereunder, for $250,000. Of the purchase price, $25,000 has been placed in escrow. If the transaction is approved by the Commission, the amount placed in escrow, plus the balance, would be paid in cash upon consummation. If the transaction is not approved, the money placed in escrow will be returned to Braswell Freight within 15 days from the date of the final order of the Commission disapproving the application. Approval of the transaction by the Commission, but

failure of consummation by Braswell Freight would result in the escrowed amount being forfeited to the seller Clarinda K. Shayler as liquidated damages. The latter warrants good title free of incumbrances. Both parties agree to cooperate in seeking approval of the transaction and incidental matters connected therewith. Consummation date is subject to agreement between the parties but in no event not later than 12 o'clock noon on the 15th day following the lapse of time for administrative appeal.

Clarinda K. Shayler discussed sale of the business with her husband prior to his death. Efforts were made to sell the property to others but were unsuccessful. Braswell Freight was located as a prospective purchaser by a third party[18] at Fort Worth to whom she is obligated to pay about $12,000 finder's fee which does not appear unreasonable in view of the purchase price and since there was no evidence that the third party was trafficking in operating rights. *Lease Plan Int'l Corporation*, 93 M.C.C. 203. Clarinda K. Shayler, the seller, gave her attorney and W. Thurman Shayler authority to negotiate the sale of the operating rights. Representatives of Braswell Freight contacted agents of the seller about June or July 1962. Since it was the desire to sell both the automotive equipment and operating rights the original asking price was $350,000. After some six months of negotiations a price of $250,000 was agreed upon for the operating rights only. Seller has consented to payment in cash.

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[18]See footnote 8 ante.

Financial Data

Financial Statement—A balance sheet as of September 30, 1963, of Braswell Freight shows assets aggregating $2,230,466, including current assets of $1,314,642, of which $790,076 is cash; tangible property, less reserve for depreciation, $647,408; intangible property less reserve for amortization $104,231; investment securities and advances $5,171; and miscellaneous $159,014. Its liabilities, including current liabilities $449,317. The capital stock account includes $1,850,000 capital stock and ($68,851) earned surplus. Its revenues for 1961, 1962, and 1963 (first nine months) were $3,345,837; $3,091,401, and $2,356,490. Deficits for those periods were ($1,796); ($318,174); and net income $57,313 after provision for income taxes. The latter figure was adjusted to reflect an income tax refund, and in a prior year depreciation adjustment totalling $221,203 shows net income of $57,313 rather than a deficit of $163,890 had the tax adjustment not occurred.

A balance sheet as of September 30, 1963 of Braswell Motor shows assets aggregating $5,972,196, including current assets of $2,263,115, of which $1,621,750 is cash; tangible assets, less reserve for depreciation $1,945,898; intangible property less reserve for amortization $243; investment, securities and advance $1,755,396; other deferred debits $7,544. Its liabilities, including current liabilities, were $325,278; long term debt due within one year $88,921, after one year $266,763. Capital stock $3,500,000, and earned surplus $1,791,234. Its revenues for 1961, 1962 and 1963

(first nine months) were $4,323,022; $3,283,968 and $2,370,601. Net operating revenue and operating losses for those periods were $429,272, ($49,785) and ($46,485). Deficits after provision for income taxes for 1961 and 1962 were respectively ($135,895) and ($150,952). Net income after provision for income taxes for the first nine months of 1963 was $33,363.

A balance sheet as of September 30, 1963 reconstructed to give effect to the merger of Braswell Freight in Braswell Motor show total assets aggregating $6,440,327 including current assets of $8,561,794, of which $2,411,826 is cash; tangible property less reserve for depreciation $2,593,306; in tangible property, less reserve for amortization $104,474; investment, securities and advances $17,191; and other deferred debits $163,562. Its liabilities, including current liabilities $758,632; long term debt due within one year $88,921, and after one year $266,763. Capital stock $3,500,000 and total surplus $1,826,011.

An adjusted balance sheet as of December 31, 1962, for the Shayler Operation shows assets aggregating $433,707, including current assets $131,805, of which $9,293 was cash. Tangible property, less reserve for depreciation $301,902. Its liabilities were $537,947, comprising current liabilities of $297,909, and long term debt of $240,038. Net worth is ($104,240). Its revenues for 1960, 1961, and 1962 were $1,059,546, $1,007,367, and $829,344, respectively. For the same years it experienced deficits of ($11,022), ($12,374) and ($148,465).

A balance sheet giving effect to the purchase of

the Shayler Rights from the seller Clarinda K. Shayler by Braswell Freight as of September 30, 1963, shows the purchase price of $250,000 plus expenses accrued in connection with the transaction ($5,782) will be charged to intangible property, with offsetting credits to cash of $225,000 and to other deferred debits of $30,782 ($25,000 escrow and $5,782 expenses).

A giving effect income statement for the Braswell Freight and Shayler Operation, as of December 31, 1961, shows consolidated revenue of $4,353,204, net operating revenue of $179,250, and net income before provision for income taxes of $227,584 after adjustment for anticipated savings of $241,754. A similar statement for 1962 reflecting strike conditions since April 23, 1962, shows a deficit of ($233,060), after adjustments for anticipated saving of $233,579.

Contentions of Parties—Although no standards of comparison are shown protestants' on brief contend that the purchase price of $250,000 for the Shayler Rights is excessive and particularly in view of losses over recent years of Braswell Freight, Braswell Motor and the Shayler Operation. They urge that the transaction should not be approved in view of those losses which stem in part, at least in the view of some protestants to the maintenance of local rates lower than conference rates and to a labor dispute. Braswell Freight disputes the arguments both at the hearing and on brief. It is claimed that based on the gross revenue of the Shayler Operation, the traffic interchanged between Braswell Freight and Shayler, the benefits to Braswell Freight and Braswell Motor of

the traffic centers of Chicago and St. Louis, the purchase price, based on arms length bargaining, is the market value, is worth the amount to be paid for it and is just and reasonable. On brief, attention is directed to the financial condition of both the applicant and the parent company as shown by their individual and consolidated balance sheets as of September 30, 1963—no equipment obligations—the only long term debt is the obligations outstanding on the purchase of Braswell Freight—combined indebtedness of the companies $1,130,000 vs combined assets of $8,200,000. Settlement of the labor problems and coupling the revenues experienced under the Shayler Operation with economies of upwards of $200,000 annually will return the Braswell Freight and Braswell Motor to the profit column. Applicant on brief discount the effect of the lower rates on its revenue since it affects less than 5 percent of its traffic, and that it reduced the revenue on such traffic by less than 2 percent of the revenue that would have been received by application of conference rates. Moreover, they conclude that since these lower rates were established to meet competition, they would not affect earnings because they increased earnings by gaining or regaining traffic that would not otherwise have moved over Braswell lines.

Purchase Price—Braswell Freight would pay $250,000 for the Shayler Rights. These rights would complement those of Braswell Freight and Braswell Motor by opening up for the first time on a single line basis the large industrial cities of St. Louis and Chicago and their environs. Tapping outlying industrial centers in Illinois and Oklahoma should enhance revenues.

It should improve service by reducing handling of traffic and delays at Oklahoma City and Tulsa, all of which would buttress the transportation posture of Braswell Freight and Braswell Motor. Had the Shayler Rights been operated by Braswell Freight in 1961 and 1962 it is estimated that some quarter of a million-dollars in savings could have been effected. Revenues from the Shayler Operation for each of the years 1960, 1961 and 1962 approximated one million dollars annually. As noted above Braswell Freight expresses the opinion that the purchase price is worth the amount to be paid for it, that it is the market value and that it is just and reasonable. Negotiations were conducted by arms length bargaining over a six months period. The purchase price, in the considered opinion of the examiner is not found to be inconsistent with the public interest. *Southeastern Greyhound Lines—Purchase (Portion)—J. B. LeVan and Florence LeVan*, 55 M.C.C. 543.

The balance sheet of Braswell Freight as of September 30, 1963 shows cash on hand of around $800,000. A favorable working capital exists. There is no long term debt. Although over capitalized it is an equity type and, even so, is not large. The reconstructed balance sheet giving effect to the merger of Braswell Freight into Braswell Motor shows capitalizable assets are $5,106,344 comprised of working capital of $2,601,096 composed cash $2,411,826, prepayments $117,082 and material and supplies $72,188 and operating equipment less depreciation $2,505,248. Capitalization is $3,855,684, comprised of long term debt $355,684, and capital stock $3,500,000. The excess of

capitalizable assets over capitalization is $1,250,660. Ratio of long term debt $355,684 to total long term debt and stockholders equity $5,681,695 would be 6.3 percent.

According to Braswell Freight economies will flow from the acquisition in saving interest payments, elimination of terminals at Oklahoma City and Tulsa of the former Shayler Operation, savings on insurance, fuel and tires. No new equipment is being acquired since Braswell has sufficient equipment to operate the rights sought.

Braswell Freight is of the opinion that considerable profit can be obtained without any increase in volume of traffic, and an analysis of the rights sought indicate earnings of upwards from $150,000 a year before provision for income taxes.

With its labor trouble resolved Braswell Freight should experience no difficulty in approaching its estimate of net income of $227,584 before provision for income taxes from the combined properties as shown in its giving effect income statement for the year ended December 31, 1961. On this basis it could recover the purchase price in not more than two and one-half years. No fixed charges are being incurred. Braswell should be able to meet the purchase price without undue difficulty, and its ability to serve the public would not be impaired. The examiner concludes that applicant is financially able to consummate the proposed transaction. Under the circumstances, the examiner recommends that Braswell's motion (1) to amend the section 5 application to show that payment for the

operating rights would be in cash, and (2) to dismiss the section 214 application, be granted.

Shayler Operation

The Shayler Operation was operated under either guardianship or lease from the time the original owner was adjudged incompetent in 1946 until it ceased operation on February 6, 1963. The operation was "an irregular route, on-call service with no fixed schedules or routes." Highway selection followed no particular pattern and was dictated by the safest, fastest, and most economical route between the particular points involved. Leased terminal facilities were maintained only in Chicago, St. Louis, Tulsa and Oklahoma City. The general office was at the last point. Some 36 pieces of equipment were operated. Cartage was primarily used at the terminals but pick up and delivery equipment was also operated in St. Louis and Chicago. It employed some 44 persons. Interchange in 1962 was conducted only at Chicago, St. Louis, Tulsa and Oklahoma City. And, there may have been some interchange at Waurika. Interchange at Tulsa and Oklahoma City was with 23 carriers including Braswell Freight. Rates of the Shayler Operation were maintained (up until Braswell Freight assumed temporary operation) in some six conference tariffs including the Rocky Mountain Motor Tariff Bureau. It also maintained an individual local tariff.

The demise of the Shayler Operation was however, attributed to several factors: (1) mergers of carriers with which it interchanged traffic; (2) inauguration of piggy back operations since the Shayler Operation

was predominantly TL, (3) inability to settle claims and interline accounts promptly, lost traffic, and (4) the purchase of new equipment in 1961 to attract more LTL traffic.

Seller

Clarinda K. Shayler, the seller, was the wife of the original owner and mother of the one that conducted the Shayler Operation under lease from some time in 1946 up through the death of his father until the lease operation ceased in February of 1963. The seller came into possession of the Shayler Rights by virtue of a will. Lease of the Shayler Rights to her son, the Shayler Operator, continued until he became in arrears in the lease rental for 13 months, and the seller had exhausted her ability to aid him financially. Since she cannot operate the Shayler Rights, Mrs. Shayler is selling them because she is (1) essentially a housewife without business experience, (2) 66 years of age, and (3) without financial resources to operate the Shayler Rights even if she could.

Braswell Freight

Since it has maintained interchange with the Shayler Operation as one of its principal connections, Braswell Freight is seeking to purchase the Shayler Rights to insure present traffic patterns of Braswell Freight and Braswell Motor on traffic moving to and from points on the Shayler Rights, and to maintain or preserve as well as restore Braswell Freight and Braswell Motor, and (2) Braswell Freights need for a heavy volume of interchange traffic at Oklahoma City

and Tulsa to bolster its lack of substantial traffic moving to and from those Oklahoma junctions.

Braswell Freight points out that; the combined operation will give single line service all weather route between Chicago and St. Louis on the one hand, and, on the other, the South Pacific coast and will reduce handling of freight in interchange, reduce loss and damage claims, improve tracing service, expedite the movement of freight, and assure the public of greater and better facility and ease for the movement of shipments.

No additional equipment is being obtained to conduct the operation.

Service is to be maintained on irregular route basis. The operation will be on a call and demand basis and will comply with standards laid down in *Transportation Activities of Brady Transfer & Storage Co.*, 47 M.C.C. 23. Over the road vehicles may not move out every day but pick up will go on five days a week. Northbound traffic originating on Braswell will be dispatched promptly on arrival at the Oklahoma junctions. Through trailer service will be operated.

Choice of the highway will be left to the driver—not sure but probably most of the drivers will use U. S. Highway 66 which is the short route.

Braswell Freight hopes to increase its tonnage and revenue. It is said that every pound of freight that can be carried will be carried.

On brief applicant asserts that approval of the transaction will not (1) result in conversion of the

Shayler Rights from irregular to regular, (2) institute a new service, (3) result in unfair competitive practices, and (4) adversely affect competing carriers. Braswell Freight according to applicant is financially able to consummate the transaction without impairing its ability to serve the public, and that approval of the transaction will enhance adequate transportation to the public.

Supporting Carrier

H. A. Day d/b/a Day Truck Line is authorized, among others, by certificate No. MC 97461, to transport property between Oklahoma City and McAlester, Okla., over U. S. Highway 270. Operations have been conducted for 15 years. Traffic is interchanged with all carriers, including the Shayler Operation and the applicant. Traffic preponderates southbound. Day has found Braswell Freight dependable and reliable and urges approval of the application.

Supporting Shippers

Seventy shippers from Chicago, Ill., St. Louis, Mo., Oklahoma City, Sapulpa and Tulsa, Okla., Phoenix and Tucson, Ariz., Commerce, Compton, El Hambra, Inglewood and Lawndale, Calif., Arlington, Dallas, El Paso, Ft. Worth, Houston, Midland, Odessa and Waco, Tex., either by direct testimony or stipulation had found the service of Braswell Freight in its conduct of the Shayler Operation under temporary control satisfactory and urged that the transaction be approved. Testimony of 38 of these witnesses was stipulated since it would have been cumulative in nature.

These shippers in general received and shipped a wide variety of commodities[14] to and from points and beyond points, on the Shayler Operation, Braswell Freight and Braswell Motor. Shipments are both LTL and TL with the former predominating. Weight of the LTL shipments range from 27 to 10,000 pounds per shipment. Frequency of shipments range from daily which preponderates to one every six months.

Some of the shippers had used the services of the Shayler Operation prior to the cessation of that carrier. Other had used the services of both Braswell Motors and Braswell Freight. Still some had used the joint service of the Shayler Operation and Braswell

[14]Shower doors; medicine cabinets; range hoods; intercoms; tools and equipment; grocery and marketing and equipment; automotive plastic products; ceramics; books and periodicals; castings; heavy trailer axles, foundry supplies, bearings; brake drums; air brake parts; signs and parts; confections and candy; chewing gum; pickles, preserves and jelly; artificial flowers; containers, glass, metal and plastic; valves, iron and brass; electrical testing equipment; metal lithograph prints; alumninum window sash; kitchen utensils; electrical transformers; precision tools; ventilating components; air filter elements; pumps; motors; pipe fittings; electrical accessories; oil field chemicals and equipment; supplies for power transmission systems; plumbing, heating and air conditioning components; motion picture films; glassware; hotel, restaurant equipment and supplies, truck equipment and parts; electrical trade supplies; styrofoam products and presses; fiberglass parts and signs; plastic houseware articles; lubricating oils and greases; asphalt roofing products; cleaning products; household goods; department store goods and sundries; carpet; drugstore goods and sundries; ornamental iron components; foods; trailer parts; janitor supplies and equipment; automobile clutch parts; brake lining; diesel engine supplies and parts; electronic equipment; industrial valves and assorted parts; mechanical and electrical machined products and components; abrasive and diamond blades; core drills; masonry and concrete saws; joint seamers and sealing grinders; chemicals and detergents; seat covers; protector mats; automobile accessories; wire display racks, lamp shades and wire parts; oil covers for automotive vehicles; lighting fixtures; plastic articles; brakes, new and reconditioned; vacuum tires; hardware and automotive supplies and parts; and hotel and restaurant supplies.

Freight prior to the stoppage of the former. While all of the shippers were using the service now under temporary control of Braswell Freight four of the five California shippers are using Braswell Motors and Braswell Freight because the former will cross picket lines which surround their plants to pick up and deliver their traffic. These four shippers have been operating their business under strike conditions under varying dates since June 1962. Two, however, used Braswell Motor prior to the strike condition. Irrespective of this factor they have found Braswell Motor's service excellant and they intend to continue to use it. Some of the shippers felt that it was good to have competition in the carrier industry the same as other industry.

These shippers had found the service of Braswell Freight and Braswell Motor dependable and reliable and tailored to their respective needs, and they urged a continuation of the service.

All of the shippers were desirous of expeditious transportation of their shipments. They were aware generally that the Shayler Operation was irregular route in character. By and large they believed their needs could be accommodated to such service if reasonable transit time were observed.

Although some of the shippers freely admitted they were taking traffic from other carriers, they were equally free to admit that they had not ceased to use other carriers many of which are protestants here. While complaints against other carriers service were few and restrained, there is no doubt that dissatisfac-

tion with other service influenced diversion of some traffic.

Approximately only nine of those testifying evinced any real interest in the lower rates of the Shayler Operation and Braswell Freight. Most of these, if not all, claimed it was only one factor in attracting them to Braswell Freight. One shipper stated categorically that the use of Braswell was not based on the rate. They did observe that the price is always a matter of consideration.

Whatever motivated these shippers to support the continuation of service now being conducted by Braswell Freight under temporary authority, it is difficult to believe that these witnesses, many of whom represented substantial companies, traveled to Oklahoma City for distances up to about 1,400 miles, did not have a sincere belief that both Braswell Freight and Braswell Motor gave good service, that the service was the kind that they needed to support their business, and that it should be continued.

Protestants

The Atchison, Topeka, and Santa Fe Railway Company introduced the only testimony on behalf of Class I Rail Carriers in the Western District. Its rail network parallels the routes of the Shayler Operation-Braswell Freight and Braswell Motor from Chicago on the east to Los Angeles on the west coast. Its primary interest is that it will afford an aggressive carrier single line service from Los Angeles, Phoenix, El Paso, Houston, Fort Worth and Dallas to Chicago in

direct competition with Santa Fe.

Be-Mac is authorized by certificate No. MC 10872,[15] to transport between points in Oklahoma on the one hand, and, on the other, St. Louis and Illinois points. It interchanges traffic to and from the west coast at Oklahoma City. Among others, terminals are maintained at Chicago, Rockford and Springfield, Ill., Tulsa and Oklahoma City. It employs over 300 persons and operates over 496 pieces of equipment. Its operating revenue (ratio) for 1962 was 91.5 and for the first second and third quarters of 1963 they were respectively 95.2, 91.7, and 90.5.

Campbell is authorized by certificate No. MC 75320 to transport between Tulsa on the south and Chicago and St. Louis on the north. Its operating ratio for 1962, and the first three quarters of 1963 were respectively 92.3; 97.3; 89.5 and 92.4.

Forwarding is authorized by certificate No. MC 906 to transport between Dallas and Fort Worth on the south, and St. Louis and Chicago on the north, including Tulsa and Oklahoma City, and numerous other points in Oklahoma. Terminals are located among others, at Chicago, St. Louis, Muskogee, Oklahoma City and Tulsa, also Dallas. Approximately 600 people are employed and 651 pieces of equipment are operated. Operating ratios for 1962 and the first three

[15]Hereinafter, it will be understood that the carrier is authorized to operate as a common carrier by motor vehicle of general commodities, with exceptions, and in some instances carriers of certain specified commodities, over regular routes, and in some instances over irregular routes. Only the authority pertinent here is recited.

quarters of 1963 were respectively 94.8; 94.8; 92.7 and 92.9.

Freightways is authorized by its certificate No. MC 42487 to transport between Chicago and St. Louis on the east, and on the west Phoenix and Tucson, Arizona and Los Angeles. Its affiliate Missouri is also appropriately authorized to operate between Denver, Colo., and Liberal, Kans. on the west and on the east Chicago and Indianapolis, Ind. Among terminals maintained are Chicago, St. Louis, Tucson, Phoenix and Los Angeles. Systemwide some 8000 pieces of equipment are operated. Operating ratios for 1962, and the first three quarters of 1963 are respectively 98.9; 103.3; 98.8, and 95.0. The operating ratio for the affiliate was below 91.1 for the four periods.

Denver is authorized by certificate No. MC 29988 to transport between Chicago and St. Louis on the east and Phoenix, Tucson and Los Angeles on the west. Terminals, among others are maintained at these points. Exhibits sponsored show investment in plant and equipment, personnel complement, and payroll at those points. Systemwide some 2200 persons are employed and 2,162 pieces of equipment are operated. It says it continues to get traffic from St. Louis from the Herman Oak Leather Company but it has lost the traffic from this company out of Chicago. Operating ratios for 1962 and the first three quarters of 1963, were respectively 91.1; 93.6; 90.1; and 86.6.

Texas is authorized by certificate No. MC 41432 to transport between Chicago and St. Louis on the north, and on the south Dallas, Fort Worth, Houston and San

Antonio. Terminals are maintained at these points. Employment and equipment located at these points are respectively 787 and 739. Systemwide it employs 2000 persons and operates 1352 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963, were respectively 91.3; 94.0; 90.7; and 91.3.

ICX is authorized by certificate No. MC 48958 to transport between Chicago on the east and Los Angeles on the west through Cheyenne, Wyo., and Denver, Colo., serving, among others, Amarillo, Dallas, Fort Worth, and El Paso. Except for Cheyenne terminals are located at all those points. It employs some 2000 persons and operates 1638 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 92.6; 97.7; 94.2; and 93.4.

Knox is authorized by certificate No. MC 19553, to transport between various points and places in Northern Illinois. Except for Moline and Rock Island all of the points of service at which terminals are maintained are in the defined area in Illinois from which traffic is authorized under the Shayler Rights for southbound service. It operates some 250 pieces of equipment.

Lee Way is authorized by certificate No. MC 61440 to transport between Chicago and St. Louis on the north, and on the south, numerous points in Oklahoma, including Tulsa and Oklahoma City, Amarillo, Dallas, Fort Worth, San Antonio, and Houston. Terminals are maintained at these points as well as at numerous points in Oklahoma. It operates 1664 pieces of equipment. Its operating ratio for 1962, and the first three

quarters of 1963, are respectively, 95.8; 98.5; 94.9; and 98.1.

Navajo is authorized by certificate No. MC 76032 to transport between the Los Angeles, Phoenix, El Paso, Amarillo, and Odessa, Tex., gateways on the one hand, and, on the other Chicago and St. Louis. General which is managed by Navajo is also a protestant here. Terminals maintained at these points have a book value of over $2 million. The two companies employ some 2500 persons. Navajo as of July 1, 1963 operated some 2200 pieces of equipment. It was stipulated that the testimony of Navajo would be the same as that of Arizona, Freightway, Denver, and Ringsby. Operating ratios of this protestant for 1962 and the first three quarters of 1963, were respectively 97.2; 98.9; 96.2; and 94.3.

PIE is authorized by certificate No. MC 730 to transport between Chicago and St. Louis on the east and the Pacific Coast serving the territory on the south to Flagstaff, Ariz. Among others it has terminals at Chicago, St. Louis and Los Angeles. The original cost of the buildings at those points approximates $3 million. It operates about 4000 pieces of equipment. Operating ratios for 1962, and the first three quarters of 1963, are respectively 94.0; 97.2; 93.6; and 93.4.

Ringsby is authorized by certificate No. MC 52709 to transport between Chicago and St. Louis on the east, and Pacific Coast points on the west. Fortier, a wholly owned subsidiary, and a protestant here is authorized by its certificate No. MC 108398 to transport general commodities with exceptions, over irregu-

lar routes between a defined area in California. Ringsby maintains terminals at Chicago, St. Louis and Los Angeles. Investment in plant and equipment at those terminals aggregates $13 million. Some 328 persons are employed at those points. Its September payroll was approximately a quarter of a million dollars. Its operating ratios for 1962, and the first three quarters of 1963, were respectively 95.3; 95.9; 95.2; and 95.8.

Roadway is authorized by certificate No. MC 2202 to transport between the Illinois points, including Chicago, also St. Louis on the one hand, and, on the other, Oklahoma points, Dallas, Fort Worth, Houston and Waco, Texas. Terminals are located at Chicago and St. Louis, Afton, Oklahoma City, and Tulsa, Okla., Dallas, Fort Worth, Houston, San Antonio and Waco, Texas. Some 4800 pieces of equipment are operated. Although not identified it says it lost traffic to the Shayler Operation because of the latter's lower rates. Its operating ratios for 1962 and three quarters in 1963 were respectively 90.6; 93.8; 89.3; and 89.3.

Southwestern is authorized by certificate No. MC 59488 to transport between St. Louis on the one hand, and, on the other, Shreveport, La., Dallas, Fort Worth, and Waco, Texas. It employs 760 persons and operates 786 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 98.9; 99.5; 94.8; and 96.6.

Arizona is authorized by certificate No. MC 59894 to transport between St. Louis on the one hand, and, on the other Los Angeles and intermediate points such as Dallas, El Paso, Phoenix and Tucson. Terminals

among others, are maintained at St. Louis and Los Angeles. It employs some 455 persons and operates about 470 pieces of equipment. Annual payroll is $3½ million. Operating ratios for 1962, and for the first three periods in 1963, were respectively 95.5; 94.5; 94.8; and 95.2.

Transcon is authorized by certificate No. MC 110325 to transport between Chicago and St. Louis on the one hand, and, on the other Oklahoma and Texas points also west coast points. Terminals, among others are maintained at Chicago, Dallas, Houston, Los Angeles, Oklahoma City, Phoenix, St. Louis, Tulsa and Tucson. It employs 1700 persons and operates about 1200 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 87.1; 88.8; 85.6 and 84.3.

Watson is authorized by certificate No. MC 70451, to transport between Chicago and St. Louis on the one hand, and on the other, Los Angeles. It maintains terminals at 44 points including those named. Its capital investment in plant and equipment is substantial, as is its pay roll. System employment is 2100 persons. Some 2700 pieces of equipment are operated. Operating ratios for 1962 and the first three quarters of 1963 were respectively 103.5; 105.6; 99.8; and 96.1.

Viking is authorized by certificate No. MC 35484 to transport between St. Louis and Chicago (including the southbound origin area in Illinois) on the one hand, and, on the other Oklahoma points, also Dallas and Fort Worth. Normally it is an LTL carrier. Terminals are maintained at the critical points. Employ-

ment is approximately 1400 persons. It operates 1462 pieces of equipment. Operating ratios for 1962, and for the first three quarters of 1963, are respectively 96.6; 99.8; 93.5; and 93.6.

Western-Gillette-Voss, are authorized by their respective certificates Nos. MC 8948, 2309 and 1422, to operate between Chicago and St. Louis on the east, and on the southwest and west, Tulsa, Oklahoma City, Dallas, Fort Worth, Houston, El Paso, Tucson, Phoenix and Los Angeles. Among others, terminals are maintained at the named points. Some 1577 pieces of equipment are operated systemwide. Approval of the transaction would establish a system parallel to protestants. Operating ratios for 1962 and the first three quarters of 1963 were respectively, for Western 99.3; 91.9; 96.1, and 97.3, for Gillette 94.3; 89.5; 94.2; and 94.5, for Voss 95.5; 111.8; 100.1 and 86.7.

Motor carrier protestants introduced in evidence traffic studies designed to show the percentage of tonnage and revenue affected by the transaction, to the protestant's total tonnage and revenue, and to demonstrate any imbalance in traffic which could worsen if diversion were effected.

At the hearing and on brief these motor carrier protestants assert that (1) the Shayler Rights had little or no competitive influence, (2) the Shayler Rights are dormant except between Chicago, St. Louis, Tulsa and Oklahoma City, and no need has been shown for their activation, (3) it will create a new service for which no public need has been shown, (4) conversion of the Shayler Rights from irregular to regular char-

acter cannot be avoided if the transaction is approved, (5) the only business attracted to the operation would be based solely on lower rates, and not on service, such rates being the basis for Braswell's financial trouble if it actually has such, (6) traffic will be diverted, (7) there is an abundance of service in the affected area and there is no need for additional service, (8) the employees will be adversely affected, (9) the purchase price is excessive, and (10) it will adversely affect existing transportation conditions and is contrary to the public interest.

Utilization of Shayler Rights

Some of the protestants contend that various portions of the Shayler Rights are dormant, both as to territory, commodities and shippers served, and that no need has been shown to reactivate those inactive parcels.

Numerous traffic exhibits have been introduced in evidence to support approval of the application. An exhibit attached to the application lists some 6,120 LTL and TL shipments transported by the Shayler Operation for the six months' period of July through December 1962. It shows all the shipments for July and December, and shipments for the first, second, third, and fourth weeks respectively for the months of August, September, October and November.

Of some 2752 shipments originating at, or transported through Chicago; 1725 originated in the Chicago commercial zone, *supra;* 221 had their source in an area in Illinois outside of the zone, bounded by

Duquoin on the south, De Kalb on the north, Robinson on the east, and Rock Island on the west. This area is considerably more extensive than the wedge shaped origin[16] territory authorized in the Shayler Rights. Principal origin points of service, except for Alton and East Alton, are located in the counties in the vicinity of the Chicago commercial zone, *supra*. Some 806 shipments for southwestern destinations were received in interchange at Chicago. Oklahoma City, Tulsa, outlying Oklahoma points were terminals respectively for 1,007; 507 and 429 of these shipments. Some 809 shipments for destination beyond Oklahoma were interlined with connecting carriers at either of the two Oklahoma junctions.

Of the 1988 shipments originating at, or moving through St. Louis; 258 originated in the St. Louis commercial zone, *supra;* 151 also originated in the outlying area of Illinois described heretofore, and 1579 shipments moved south through St. Louis. Oklahoma City, Tulsa, and outlying Oklahoma points terminated respectively 636; 336 and 660 shipments. The Oklahoma junctions were interline points for 356 shipments destined beyond.

The 372 shipments originating outside of the Chicago commercial zone, *supra*, came from 42 Illinois points. Thirty six of the points are in the wedge shaped origin territory in Illinois authorized as points of service under the Shayler Rights. Included in these

[16]The vertex centered about the St. Louis area, the breadth of its base, which included Chicago and its commercial zone, extended from a point on the Illinois-Wisconsin State line just north of Freeport, Ill., to a point on the Illinois-Indiana State line just east of Paxton, Ill.

shipments are: One truckload of 20,000 pounds or over from Alton; three less-truckloads and four truckloads of 20,000 pounds or more from Chicago Heights; four truckloads of 20,000 pounds or more from East Alton; one less-truckload from Highland Park; two less-truckloads and one truckload of $20,000 pounds or more from Joliet; one less-truckload from Northfield; one truckload of 20,000 pounds or more from Rock Falls; and eight less-truckload and two truckloads of 20,000 pounds or more from Sycamore. Included in approximate 125 terminated in Illinois were: One less-truckload to Alton; one less-truckload to Aurora; one truckload of 20,000 pounds or more to Chicago Heights; one truckload of 20,000 pounds or more to Peoria; five truckloads of 20,000 pounds or more to Plainfield, and one truckload of 20,000 pounds or more to Park Forest.

Of 1041 shipments originating at, or interlined through Oklahoma City; 699 were from that city and 222 were from other Oklahoma points. Some 120 northbound shipments were interlined at Oklahoma City. Chicago, St. Louis, outlying Illinois points were destinations respectively for 293; 88, and 81 shipments. Interlined at either Chicago or St. Louis were 579 shipments destined beyond Illinois.

Tulsa was origin or interline point for 339 shipments. Of this total 186 were from Tulsa, and 73 from other Oklahoma points. Eighty northbound shipments were interlined at Tulsa. Chicago, St. Louis and outlying Illinois points were destinations respectively for 36; 87 and 54 shipments. Interlined through Chicago

or St. Louis for destination beyond Illinois were 162 shipments.

Excluding Oklahoma City and Tulsa some 1089 shipments are shown as originating or terminating at outlying Oklahoma points. Included in the above were: Miami, Ottawa County, nine shipments terminated—one a truckload of 20,000 pounds or over; Pryor, Mayes County, 13 shipments terminated—one weighing 6600 pounds; Muskogee, Muskogee County, 59 shipments terminated—one weighing 5285 pounds, and four truckloads, each weighing 20,000 pounds or over; Krebs, Pittsburg County, two shipments terminated—one weighing 5440; Hugo, Choctow County: terminated seven shipments—originated 31 shipments, one weighing 5215 pounds, and one truckload weighing 20,000 pounds or more; Bartlesville, Washington County: terminated 33 shipments, one weighing 5186 pounds — originated 18 shipments; Sand Springs, Tulsa County: terminated eight shipments—originated 18 shipments, five weighing from 10,000 to 20,000 pounds each, and 13 truckloads each weighing 20,000 pounds or over; Sapulpa, Creek County: terminated nine shipments one weighing 5205 pounds—originated 37 shipments, 27 weighing less than 5,000 pounds each, two weighing from 5,000 to 10,000 pounds each, five weighing from 10,000 to 20,000 pounds each, and three weighing each 20,000 pounds or over; Okmulgee, Okmulgee County: terminated 21 shipments—originated seven shipments, one weighing less than 5,000 pounds, six weighing each, 20,000 pounds or over; Henryette, Okmulgee County: terminated four shipments, one a truckload weighing

20,000 pounds or more—originated 47 shipments, one weighing less than 5,000 pounds, two weighing from 5,000 to 10,000 pounds each, three weighing from 10,000 to 20,000 pounds each, and 41 weighing each, 20,000 pounds or more; Ponca City, Kay County, 35 shipments terminated, two weighing respectively 6321 and 6901; Stillwater, Payne County, 19 shipments terminated, one weighing 5687 pounds; Shawnee, Pottawatomia County: terminated 35 shipments—originated two shipments, one weighing less than 5,000 pounds, and one weighing 20,000 pounds or over; McLoud, Pottawatomia County, one shipment weighing 5056 pounds terminated; Ada, Pontotoc County: terminated 25 shipments—originated 15 shipments, one weighing less than 5,000 pounds, and 14 weighing each, 20,000 pounds or more; Lindsay, Garvin County: terminated, four shipments—originated nine weighing each 20,000 pounds or more; Wynnewood, Garvin County, three shipments terminated, two weighing less than 5,000 pounds each, and one weighing 20,000 pounds or more; Ardmore, Carter County, 17 shipments terminated, 16 weighing less than 5,000 pounds each, and one weighing 20,000 pounds or over; Enid, Garfield County, 63 shipments terminated, 59 weighing less than 5,000 pounds each, two weighing from 5,000 to 10,000 pounds each, and two weighing each 20,000 pounds or more; Chickasha, Grady County: terminated 21 shipments—originated two shipments weighing each, 20,000 pounds or more; Duncan, Stephens County, 39 shipments terminated, 38 weighing less than 5,000 pounds each, and one weighing 20,000 pounds or more; Ft. Sill, Comanche County, 41 ship-

ments terminated, 38 weighing less than 5,000 pounds each, and three weighing 20,000 pounds or more; Lawton, Comanchee County: terminated 71 shipments, one weighing 6186 pounds—originated one shipments weighing less than 5,000 pounds; Fort Supply, Woodward County, one shipment weighing 10,500 pounds terminated; Woodward, Woodward County, eight shipments terminated, one weighing 11,150 pounds; Clinton, Custer County: terminated 10 shipments, one weighing 12,884 pounds—originated seven shipments weighing less than 5,000 pounds each—one additional shipment weighing 5622 pounds from Clinton Sherman Air Force Base; Guyman, Texas County, nine shipments terminated, one weighing 11,220 pounds.

As evidence of traffic originating or terminating south or west of Oklahoma and Texas the exhibit shows two shipments of lamps, and a duplicating machine from Chicago to Cimarron, Colo., and N. L. Tmps., Mex., one shipment of spark plugs from Fostoria, Ohio, to El Tors, Calif.; two shipments of doors, and angles from St. Louis to Corona, and Los Angeles, Calif., respectively; one shipment of plastic art from Baltimore, Md., to Albuquerque, N. M.; six shipments of transformers, dresses, castings, castings, jackets, and castings from Los Angeles to Kokomo, Ind., La Grange, Ill., Minneapolis, Minn., Elkhart, Ind., Chicago and St. Louis respectively; one shipment of advertising material from Hollywood to Watseka, Ill.; one shipment of meters from El Monte, Calif., to St. Louis; one shipment of tents from San Mateo, Calif., to Hannibal, Mo.; one shipment of toilet preparations from Phoenix, Ariz., to Franklin Park, Ill.; one ship-

ment of tableware from Pt. Gibson, Miss., to Plymouth, Minn.; and two shipments, one of calendars and the other unknown, from Shreveport, and Bogalusa, La., respectively to St. Louis.

The exhibit also shows three truckloads of carbide from Keokok, Iowa to Oklahoma, two to Oklahoma City and one to Enid.

A recap of the above exhibit for the months of July and December, 1962 introduced in evidence at the hearing, showed a total of 3669 shipments, weighing 6,146,281 pounds were handled. Of this total 163 shipments each weighed 10,000 pounds or over. The total weight was 3,832,198 pounds.

Another tabulation sponsored at the hearing showed that during the period from March 20, 1963 through September 1963 when Braswell Freight operated under temporary control the certificates here sought, it transported some 5,290 shipments weighing 7,247,846 pounds southbound from Chicago and St. Louis, and some 2,012 shipments, weighing 3,342,420 pounds northbound from Phoenix and Tucson, Ariz., Los Angeles, Calif., Oklahoma City and Tulsa, Okla., Dallas, El Paso, Ft. Worth, Houston, Odessa, San Antonio and Waco, Texas. Of the southbound shipments 176 each weighed 10,000 pounds or more. Northbound shipments weighing 10,000 pounds or more numbered 85, of which 25 and 54 shipments originated respectively at Oklahoma City and Tulsa.

An exhibit was sponsored at the hearing showing some additional shipments transported by the Shayler

Operation dating from January 2, 1962 to July 1, 1962, as well as shipments listed in the exhibit filed with the application. It was designed to show points in Illinois outside of the Chicago commercial zone, *supra*, and points in Oklahoma, outside Oklahoma City and Tulsa, to and from which the Shayler Operation had maintained direct service. Some 178 shipments with a total weight of 1,441,757 pounds were originated at the Illinois origins. Shipments and weight to the Oklahoma points, and from the Oklahoma points totaled respectively, 192 and 347 shipments and 2,372,363 and 6,945,839 pounds. An abstract of freight bills was also submitted at the hearing showing points of service at outlying points in Illinois and Oklahoma during operating under temporary authority by Braswell Freight.

Testimony as to the Shayler Operation was to the effect that (1) service was offered to all the area authorized to be served, (2) no attempt was made to limit or restrict operations as to territory or commodities, (3) about 95 percent of the traffic originating at outlying Illinois points originated on other carriers, and (4) direct service was provided to Addison, Alton, Aurora, Buda, Chicago Heights, Downers Grove, East Alton, Elk Grove Village, Elmhurst, Joliet, Rock Falls, Sycamore, Villa Park and Wheaton.

Evidence shows approximately 372 shipments originated, and 125 shipments terminated at outlying Illinois points. Particularizing there were 15 LTL and 13 TL shipments transported under the Shayler Operation from Alton and East Alton in Illinois and from points located in an area immediately adjacent to the

Chicago commercial area. Excluding one TL to Peoria, two LTL and seven TL shipments terminated in the area around Chicago. As supplemented at the hearing some 178 shipments were shown as originating at points to which the Shayler Operation maintained direct service. One TL shipment terminated at Peoria in Peoria County, and one LTL shipment weighing 5305 pounds, and one TL shipment originated respectively at Buda, in Burea County, and Rock Falls in Whiteside County. These points are located on the western border of the Shayler Rights in Illinois. Except for Chicago and St. Louis there was no substantial shipper[17] support for the maintenance of service from the Illinois origin points in the area described in footnote 16 above. Despite claims of offering service to all the area authorized to be served, it is admitted that 95 percent of the originated traffic at outlying points was by connecting carriers. It is manifest from the record that the straightened financial condition of the Shayler Operation dictated curtailment of the scope of service at least in Illinois. However, the evidence is persuasive that an effort was made to serve the Illinois area in the vicinity around the Chicago commercial zone, *supra*, and Alton and East Alton in the St. Louis area. Under the circumstances, the examiner concludes, and so finds, that except for traffic originating in the counties of Cook, DeKalb, DuPage, Kane, Lake, Madison, and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone, *supra*, the operating rights from points and places in Illinois described in certificate No. MC 70380

[17] A shipper at El Paso receives cosmetics from Lincoln, Ill.

are dormant and should be cancelled.

Testimony as to the Shayler Operation in Oklahoma was substantially the same as to the Illinois origin territory. It was likewise claimed that direct service was maintained to some 40 destinations and some 11 origins in Oklahoma. Eight of the origins are also listed as destinations.

Excluding Oklahoma City and Tulsa, evidence shows some 1089 shipments originated or terminated at outlying Oklahoma points in 73 of its 77 counties. As illustrated above shipments ranging from LTL. 5000 to 10,000 pounds, 10,000 to 20,000 pounds, and 20,000 or more pound lots were both picked up and delivered to points in an area bounded by Miami on the east, Fort Supply on the west, Ardmore on the south, and Ponca City on the north. The entire state is substantially blanketed. Evidence of record indicates that pick up, or delivery of shipments, and especially smaller shipments, to the extent such service was performed, was accomplished by combining the pick up or delivery with shipments of anything greater than about 3,000 pounds. This is clearly supported by the mosiac of the origin and destination of the shipments shown in the exhibit accompanying the application. Approval of the application was urged by shippers from Chicago, St. Louis and some from other points. A shipper at Sapulpa and a Chicago factory representative for the same firm urged approval. In contrast to service performed at the Illinois origins discussed heretofore, the evidence is convincing that service to and from outlying Oklahoma points was

rendered on a reasonably continuous and adequate basis consistent with the straightened financial condition of the Shayler Operation. Under the circumstances the examiner concludes and so finds that the territorial scope of the operating rights as to outlying origin and destination points in Oklahoma described in certificate No. MC 70380 are not dormant.

Transportation of carbide from Keokuk, Iowa, to Oklahoma points has been reasonably continuous and substantial for the period shown and the examiner so finds.

The evidence of record shows, and the examiner concludes and so finds, that service between Chicago and St. Louis and their commercial zones, on the one hand, and, on the other Tulsa and Oklahoma City, was rendered on a reasonably continuous and adequate basis consistent with the straightened financial condition of the Shayler Operation.

Since the Shayler Rights are general commodity, with exceptions, irregular route common carrier authority, and since the evidence of record shows that a variety of commodities for various shippers have been transported by the Shayler Operation consistent with its resources the examiner concludes and so finds that protestants other contentions as to dormancy are without merit.

New Service

Protestants' claim that approval of the transaction will create a new service for which no public need has been shown. Some of these protestants' urge that, if

it is found desirable in the public interest to approve the transaction, a restriction be imposed to prevent transportation between Chicago and St. Louis on the one hand, and, on the other Phoenix and Tucson, Arizona, and west coast points. Braswell Freight counters, that the record clearly shows, that Braswell Freight and the Shayler Operation have over the years. interchanged a substantial and continuous volume of traffic with each other and other connecting carriers.

The dormancy issue has been disposed of previously.

Principal points of interchange between the Shayler Operation and Braswell Freight has been at Tulsa and Oklahoma City. In the past some interchange has been conducted by the Shayler Operation with connecting carriers at Waurika, Okla.

In addition to the shipments to and from Oklahoma and Texas points shown in the exhibit accompanying the application, the following shipments are shown: three to California, one to Colorado, one to New Mexico, and one to Mexico; one from Arizona, one from Mississippi, and two from Louisiana. Three exhibits sponsored at the hearings showed interchange (1) between the Shayler Operation and 22 connecting carriers at Oklahoma City and Tulsa, (2) between the Shayler Operation and Braswell Freight, and (3) between Braswell Freight operating the Shayler Rights under temporary authority and 23 connecting carriers at Oklahoma City and Tulsa.

The first named exhibit covered a period of 60 days in 1962, in which the Shayler Operation delivered 463

shipments, weighing 573,846 pounds to 14 connecting carriers at Oklahoma City, and 232 shipments, weighing 94,367 pounds to eight connecting carriers at Tulsa. It received back 29 shipments, weighing 44,856 pounds from six connecting carriers at the former point, and 58 shipments, weighing 27,655 pounds from three connecting carriers at the latter point. Two shipments to New Mexico points are shown in June 1962.

Under the second named exhibit, interchange with Braswell Freight for September 1960, 1962, and January and February 1963 totaled some 1600 shipments, weighing 5,164,578 pounds at Oklahoma City and Tulsa for southbound movement, and 192 shipments, weighing 277,909 pounds, at those points for northbound movement. For the month of September 1960, it shows one shipment to California; five to Louisiana, and one to Arizona; 14 from El Paso, Texas; 19 from California points, and 11 from Arizona points.

Interchange under the third exhibit showed that Braswell Freight operating the Shayler Rights under temporary authority for the period April through September 1963, delivered to 16 carriers at Oklahoma City some 745 shipments weighing 432,067 pounds, and to seven carriers at Tulsa, some 167 shipments weighing 131,387 pounds, all of which were destined to Oklahoma and Texas points. It received back five shipments weighing 60,066 pounds, all destined to Chicago except one which was destined to Pittsburgh, Pa.

The record shows that interchange between the

Shayler Operation and Braswell Freight, and between those carriers and others has been substantial and continuous.

Moreover, the extent of the interchange, as shown by the record, between points on the Shayler Operation, and beyond, on the one hand, and, on the other, points in New Mexico, Arizona and California, while not large, has not been of such insufficient volume to warrant a finding that a new service would be instituted with respect to this traffic. Where, as here, there has been substantial interchange generally denial is not warranted because interchange in every direction and to every possible point is not shown. *D. C. Hall Company—Purchase—David C. Hall and D. C. Hall Transport, Inc.*, 70 M.C.C. 233.

The Shayler Operation has its roots in a "grandfather" application. Its tenure in business lends strength to a need to continue the business.

Seventy witnesses located at some 20 points on the Shayler Rights and on the lines of Braswell Freight and Braswell Motor, supported a need for a continuation of that service which had been provided in the past by a combination of the involved rights.

The examiner is of the opinion, and so finds that approval of the transaction would not create a new service.

Under the circumstances a restriction as requested by some of the protestants is unnecessary. See *Viking Frt. Co.—Control—Cook Truck Lines*, 58 M.C.C. 679.

Conversion of Irregular to Regular Rights

Protestants insist that it is incompatible to join an irregular route right with a regular route operation; that Braswell Freight cannot maintain the viability of the irregular character of the rights; that the evidence discloses that Braswell Freight has operated the Shayler Rights under temporary authority as regular route rights and that it proposes to continue on such a concept; and that approval of the transaction would be contrary to the public interest. Braswell Freight denies these charges and says it has in the past, and proposes in the future too, operate the Shayler Rights in conformity with standards laid down in *Transportation Activities of Brady Transfer & Storage Co., supra.*

The record shows that both the Shayler Operation, and the Braswell Freight operation under temporary authority has been more frequently over U. S. Highway 66 than any other route; the evidence shows other routes are also used. There is no evidence that the use of this particular route has become routinized. While U. S. Highways 66 and Interstate 44 are perhaps the shortest and best maintained there is a choice of routes between the termini of the Shayler Operation and it is presumed and expected that Braswell Freight will conduct the Shayler Operation in accord with its original character. The record before this examiner does not support protestants' contentions that the character of the Shayler Operation has under gone a change in character under temporary control by Braswell Freight. In this connection see *Stockpile—Purchase—*

Popkin, 50 M.C.C. 89, *Woolen—Purchase—Columbia Truck Exp.*, 49 M.C.C. 586, and *Garrett Freight Lines, Inc. v. Northern Transp. Co.*, 47 M.C.C. 707.

Tariffs and Rates

Much of the testimony at the hearing dwelled on the (1) rate structure maintained by the Shayler Operation and adopted by Braswell Freight, and (2) the rate structure maintained by Braswell Freight and Braswell Motor. Without reciting the various contentions of the parties it is only necessary to say here that the evidence shows that by and large those rates were published to meet rail competition. Moreover, the act contains adequate provisions for consideration of such matters presented in appropriate proceedings before the Commission. *Old Colony Forwarding Corp.—Purchase—Ryan*, 25 M.C.C. 693, 698.

Affect on Competing Carriers

Protestants' claim there is an abundance of service provided between the points involved in the transaction, and that there is no need for an additional carrier. According to them there has been no showing that existing service is inadequate, or any need for an additional carrier. Approval of the transaction, they conclude, will divert traffic from, and adversely affect, existing carriers, and disrupt the general competitive situation.

Braswell Freight points out that most of the protestants are large, and well established carriers, and that

by and large most of them have been unable to isolate any particular traffic that would be subject to diversion. In any event they have not shown what impact, if any, a loss of traffic would have on their financial condition. Despite protestants claims and apprehensions, applicant directs attention to the fact that all protesting carriers have enjoyed increases in revenue, tonnage and improved operating ratios over the period from 1959 through the first three quarters of 1963, a portion of the 1963 periods cover temporary operation of the Shayler Rights by Braswell Freight.

The record shows that loss of traffic to either the Shayler Operation, Braswell Freight, Braswell Motor, or the joint operation was more fancied than real. Eleven of the protestants had lost no traffic, as of the date of the hearing, and were unable to insolate any that would be subject to diversion. Traffic lost by applicants lower competitive rates was regained by protestants when the lower rates were met or cancelled. In most instances protestants did not elect to meet the lower competitive rates. Even though some of the supporting shippers testified they had diverted traffic to applicant's joint operation, they gave assurances, and it has been confirmed by protestants, that they were not giving all their traffic to applicants.

One supporting shipper asserted that the traffic he was routing over Braswell Freight was not diverted from any competing carrier, but on the contrary reflected an increase in his business. This increase in business is widespread due to the expansion in popula-

tion[18] in 1960 over 1950, of which official notice is taken.[19]

Protestants are securely established carriers earning substantial revenues and showing favorable earnings. The record contains no facts to support an inference of diversion of any substantial amount of traffic to applicant, nor estimates of such diversion, nor evidence as to the relationship between estimated diversion and profitability of protestants' operations. *McFodden Express, Inc.—Purchase— Bay State Motor Express Co.*, 75 M.C.C. 111, 127-128. Mere apprehension in the absence of showing as to just how much traffic protestants would lose or how their operations would be harmed, is entitled to little weight *United States Van Lines, Inc. — Purchase — Davis Transfer*, 80 M.C.C. 135, 144.

Unquestionably protestants will lose some traffic as a result of approval of the transaction. However, the competitive impact upon protestants, as established by this record does not appear to warrant disapproval of the application for this reason, and the examiner so concludes and finds.

Interest of Carrier Employees

The Central Conference of Teamsters,[20] and Team-

[18]In this connection it is noted from the official census, Bureau of Census, Department of Commerce, that substantial increases have occurred in the population of the States of Arizona, California, Illinois, Missouri, New Mexico, Oklahoma, and Texas in 1960 over 1950. Even since the 1960 census the United States population has increase by over 10 million.

[19]*Commercial Zones and Terminal Areas.* 46 M.C.C. 665 (676).

[20]Affiliated with International Brotherhood of Teamsters.

sters' Local Union No. 710, are hereinafter referred to as the union. It takes the position that the application should be denied on the ground that it is contrary to national labor and transportation policy and would adversely affect the employees of vendor and vendee, and inconsistent with the public interest.

The union represents certain former employees of the Shayler Operation who were engaged in dock work and line driving. These employees were covered by an agreement entered into between the Shayler Operation and the union for the period February 1, 1961 to and including January 31, 1964. This provided among other things that the agreement would be binding on the parties thereto, their successors, administrators, executives, and assigns, and, in the event an entire operation or individual run or runs were sold, transferred, or taken over by a sale, transfer, assignment, receivership, or bankruptcy proceeding, such operation would continue to be subject to the terms and conditions for the life thereof. In 1962 the Shayler Operation employed some 44 persons: 12 in Chicago, including three pick-up and delivery drivers; four in St. Louis, two in Tulsa, and 11 in Oklahoma City. Fifteen of the 44 employees were regular line drivers. Not included in this complement are two extra line drivers.

The employees of the Shayler Operation were terminated as of the close of business February 5, 1963, under circumstances related in the paragraph under "Background", *supra*.

On brief, the union reviewed the evidence presented

at the hearing. It points out that it is the collective bargaining agent for the employees of the Shayler Operation, and Braswell Freight although the latter has refused to bargain collectively. According to the union the Shayler employees are entitled to continuation of protection of the agreement under the above clause. The union argues that the Shayler Operation was actually a joint venture, and that the separation of identities of the three Shaylers, father, son and mother is a legal fiction since it has held out to the public as Warren G. Shayler Truck Line. By use of this device, the union alleges, that the seller, Clarinda K. Shayler hopes to extract a quarter of a million dollars from the Shayler Rights, free and clear of debts to creditors and wages owed to employees of the Shayler Operation, which are now relegated for relief to the bankruptcy court. Assuming that the Shayler Operation is the transferor rather than Clarinda K. Shayler, it alleges that the statement in Exhibit D-5 is false because the transferor had a full complement of employees on January 28, 1963 the date of the application.

On brief the union urges denial of the application, or in the alternative (1) require Braswell Freight to recognize and conform to the collective bargaining agreements now in effect between the Shayler Operation and the union, and (2) pay former Shayler employees employed by Braswell Freight, a monthly displacement allowance for a period of four years for any loss of income and benefits between the old and new employment, based on their average earnings for the year preceding such displacement, (3) pay dismissed

former Shayler employees either a monthly dismissal allowance equal to the aforementioned displacement allowance, or a lump sum separation allowance based on length of service, (4) compensate employees required to change residence as result of transfer for loss in sale of real estate, broken leases, or moving expenses, (5) grant full recognition of the seniority status of all former Shayler employees employed by Braswell Freight, and (6) adjudicate any dispute arising out of the application of the foregoing conclusions by arbitration.

Braswell Freight's position throughout has been that bare operating certificates are the only thing involved, that the purchase was made from the owner of the certificates who was not an operator, and that Braswell Freight was under no obligation to protect the employees of the Shayler Operation on the same basis as where a transaction involved taking over the operations of the vendor. Likewise its position has been that if the Commission found otherwise Braswell Freight would be guided by the Commissions direction.

Braswell Motor's operation west of El Paso, recognizes the union and is a party to a collective bargaining contract. Braswell Freight also had a contract with the union which expired at midnight January 31, 1961. Since that time it has operated on a non-union basis. Since December 1960 the union has been unsuccessful in its attempts to negotiate a collective bargaining agreement with Braswell Freight. Since April 23, 1962 a strike has been in effect by the union

against Braswell Freight. On August 12, 1963, the General Counsel of the National Labor Relations Board, on behalf of the Board, has asserted that Braswell Freight et al, refused to bargain collectively in good faith. Hearing was held on this complaint a short time prior to the instant hearing.

The issues are (1) whether or not this Commission should require Braswell Freight to recognize and conform to the collective bargaining agreements now in effect between the Shayler Operation and the Union, (2) whether or not the employees of the Shayler Operation who were discharged as of the close of business February 5, 1963 because of the cessation of the Shayler Operation were adversely affected by this transaction, and (3) if the employees were so adversely affected should terms of protection requested by the union be accorded.

With respect to the first issue, the Commission has taken the position that whether or not a union contract shall be binding upon subsequent purchases of the employers is a matter for determination by the courts rather than by this Commission *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.*, 87 M.C.C. 235.

In connection with the second issue, and at the outset, it should be pointed out that section 5(2)(c)(4) provides that in passing upon any proposed transaction under the provisions of section 5(2) the Commission, shall "give weight" to the interest of the carrier employees affected. *Midwest Busline Inc.—Purchase—American Busline Inc.*, 80 M.C.C. 681. The imposition

of employee protective conditions in cases involving unification of motor carriers is purely a matter of discretion with the Commission, whereas imposition of such protection is made mandatory by statute in section 5 cases involving unification of rail carriers. No. MC-F 8393, *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, (not printed) decided July 31, 1964. There is no requirement, however, that they be held harmless whatever the circumstances. *Midwest—Purchase (Portion)—American*, 90 M.C.C. 173.

The financial difficulties of the Shayler Operation began about 1958. Purchase of a large quantity of motor vehicle equipment in 1961 apparently resulted in worsening the financial condition. It became unable to pay its insurance premiums. Lease rental of the Shayler Rights were already in arrears. Efforts were made to sell the entire business. Negotiations were entered into with Braswell Freight to sell the equipment and Shayler Rights for $350,000. After extended negotiations the sale of the equipment was dropped and a contract was entered into on January 28, 1963 to sell the Shayler Rights for $250,000. Because of the cancellation of the insurance premiums the Shayler Operation ceased on February 5, 1963. The motor vehicle equipment was recovered under conditional sales contracts, the employees were terminated, and the Shayler Rights were under contract of sale to Braswell Freight. Vendee sought, and was granted temporary authority to operate over the Shayler Rights which was commenced March 18, 1963.

Since Braswell Freight was involved in a labor dispute at that time it was only willing to accept the former employees of the Shayler Operation on a non-union basis. However, the record shows, and this is despite the breakdown in communication between the Shayler Operation and Braswell Freight, an employee of the former, a Mr. Heider was told by the latter at El Paso, prior to February 5, 1963, and before temporary control was granted that any employee of the Shayler Operation who wanted work could file an application which would be considered on a non-discriminatory basis. Several former employees of the Shayler Operation went to work for Braswell Freight and several others were offered employment but they refused to cross picket lines. Apparently only one former employee of the Shayler Operation was working for Braswell Freight at the time of the hearing. The record does not, however, indicate that any of the former employees are unemployed.

Braswell Freight reiterates that it will give employment to any former employee of the Shayler Operation if qualified. It says it will comply with the requirements of the National Labor Relations Board at all times insofar as bargaining is concerned, that it does not intend to conform until required by the Board so to do. This dispute is now before the Board. In this connection see *Burlington Truck Line v. United States*, 9 L Ed. 2d, 207, 218.

The record supports the conclusion that every action taken in the series of events leading up to the sale of the Shayler Rights to Braswell Freight, from the de-

claration of incompetency of the father in 1946 to the sale of those rights had the sanction of the courts, and where leasing of the Shayler Rights were concerned the action had Commission approval. There is no evidence of any union intervention in any of these numerous proceedings. It must be presumed in the absence of any affirmative showing to the contrary that the actions taken by the court and Commission were proper.

Except for the bare allegation that the relationship between the elder Shayler, his wife, and son is a legal fiction, there has been no probative evidence submitted supporting this charge.

The conclusion seems warranted that the former employees of the Shayler Operation were not adversely affected as a direct result of the purchase of the Shayler Rights by Braswell Freight under section 5, and that the provisions of section 5(2)(c)(4) are inapplicable.

The third issue need not be reached in view of the conclusion and finding of the examiner with respect to issue number two.

The main thrust of the union position is that the application be denied. How denial of the application would aid the former employees of the Shayler Operation, particularly those which the union is obligated to protect, is not understood. The Shayler Operation was in financial straights due to its inability to attract necessary tonnage to support its fiscal requirements. The former proprietor is bankrupt. The seller is a

housewife, without the experience to conduct a trucking operation and without necessary capital if she had the experience. Nor is there any evidence in the record that she would resume the operation if the application be denied. To deny the transaction would impair, if not actually destroy, the ability of the Shayler Rights to form the basis for, and generate any employment potential. Approval of the transaction, on the other hand, will insure the ability of those operating rights to aid employment. Certainly the public interest, insofar as it touches the labor community, would not be served by disapproval of the transaction.

Discussion

Approval of the transaction will open up to Braswell Freight as local service points Chicago and St. Louis, and in conjunction with Braswell Motor, afford single line service from those points to the various Texas, New Mexico, Arizona and California points served by Braswell Motor. The management ability of Braswell Freight coupled with the extension of territorial coverage will afford the shipping public more single line capacity needed to meet the productive requirements of our growing nation and will serve the public interest. Moreover the shipping public which has used the Shayler Rights in the past are assured of there continuance.

No fixed charges are involved.

The examiner concludes and so finds that the transaction, to the extent herein indicated, is consistent with the public interest and should be approved.

All requested findings of fact, and conclusions of law, made by the parties at the hearing or on brief have been considered, and except to the extent adopted below, have either been found inappropriate or are overruled.

All of the requested findings of fact and conclusions of law of applicants are adopted, except No. 29 which is adopted in part, and rejected in part. It is rejected in part because all of the operating rights from points and places in Illinois described in No. MC 70380, except from points and places in the counties of Cook, De Kalb, Du Page, Kane, Lake, Madison, and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone, *supra*, have been found to be dormant and required to be cancelled as a condition of approval of the transaction.

All of the requested findings and conclusions of ICX are rejected, except Nos. 1 and 3 which are adopted. Nos. 2 and 7 are adopted in part and rejected in part. They are adopted to the extent that certain of the authority from points and places in the State of Illinois, herein described and delineated, have been found dormant.

All of the requested findings and conclusions of General, Navajo, and Roadway are rejected, except No. 1 which is adopted in part and rejected in part. It is adopted to the extent that certain of the authority from points and places in the State of Illinois herein described and delineated, have been found dormant.

Ultimate Findings and Order

In No. MC-F 8358, the examiner finds that the purchase by Braswell Motor Freight Lines, Inc.,[21] of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, and acquisition by J. V. Braswell of control of the operating rights through the purchase, upon the terms and conditions set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest, and that, if the transaction is consummated, Braswell Motor Freight Lines, Inc.[21] will be entitled to operate under the rights confirmed in No. MC 70380, MC 70380 Sub 1, and MC 70380 Sub 2, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name with duplications eliminated, subject to the condition that all of the operating rights from points and places in Illinois described in No. MC 70380 have herein been found to be dormant, and are to be cancelled, except from points and places in the Counties of Cook, De Kalb, Du Page, Kane, Lake, Madison and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone *supra*.

In Finance Docket No. 22543, the examiner finds that it should be dismissed.

Premises considered, it is the ORDER of the Hearing Examiner, that:

---

[21] Successor in interest to Braswell Freight Lines, Inc.

(1) Finance Docket No. 22543 should be, and, it is hereby dismissed.

(2) The purchase by Braswell Motor Freight Lines, Inc., El Paso, Texas, of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler Individually and as Executrix and sole devisee of said estate, acquisition by J. V. Braswell of control of the operating rights through the purchase, be, and they are hereby approved and authorized, subject to the terms and conditions herein set forth.

If the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217 and 221(c) of the Interstate Commerce Act and with the rules, regulations, and requirements prescribed thereunder; and (2) confirm in writing to this Commission, immediate after consummation has actually taken place.

If the authority herein granted is exercised, Braswell Motor Freight Lines, Inc., shall submit for consideration sworn statement and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transactions authorized, including the consideration, legal and other fees, commissions, witness fees, and any other cost incidental to the transactions, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

The authority herein granted shall not be exercised

before the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 90 days from the date of service of such notice or order, this order shall be of no further force and effect.

Effective with consummation of the transaction herein authorized, or 90 days from the date of service of said notice or order, whichever first occurs, the temporary authority granted by the order of February 25, 1963, as extended by the order of July 17, 1963, for temporary operation of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, shall be of no further force and effect.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, James F. Perrin, Hearing Examiner.

Dated at Washington, D. C. this 10th day of December, A. D. 1964.

HAROLD D. McCOY,

Secretary

(SEAL)

APPENDIX D

CARRIER OPERATING REPORTS SHOWING REVENUE, TONNAGE, AND OPERATING RATIO

Add 000 to all Columns except Operating Ratio

CARRIERS		Revenue	Tonnage	Operating Ratio
Be-Mac Transport Company	1959	6008	255	94.3
	1960	5962	236	98.3
	1961	6559	242	91.7
	1962	7054	267	91.5
1st Qtr.	1963	1734	65	95.2
2nd Qtr.	1963	1829	70	91.7
3rd Qtr.	1963	1931	74	90.5
Campbell Sixty-Six Express	1959	15800	598	90.6
	1960	16662	629	93.3
	1961	18028	648	91.5
	1962	18331	637	92.3
1st Qtr.	1963	4384	151	97.3
2nd Qtr.	1963	4909	172	89.5
3rd Qtr.	1963	5123	177	92.4
Consolidated Forwarding	1959	7300	257	96.1
	1960	7433	251	98.3
	1961	8316	274	93.9
	1962	9083	300	94.8
1st Qtr.	1963	2268	74	94.8
2nd Qtr.	1963	2468	81	92.7
3rd Qtr.	1963	2457	78	92.9
Consolidated Freightways, Inc.	1959	78390	4630	96.7
	1960	99863	4866	99.1
	1961	86793	4907	97.0
	1962	85215	5217	98.9
1st Qtr.	1963	28520	1190	103.3
2nd Qtr	1963	30058	1162	98.8
3rd Qtr.	1963	30176	1311	95.0

CARRIERS		Revenue	Tonnage	Operating Ratio
Denver Chicago Trucking Co.	1959	39704	621	91.8
	1960	40592	638	90.3
	1961	42259	654	90.1
	1962	43838	672	91.1
1st Qtr.	1963	10720	162	93.6
2nd Qtr.	1963	11340	167	90.1
3rd Qtr.	1963	11865	174	86.6
East Texas Motor Freight Lines	1959	16117	467	92.2
	1960	15712	452	95.1
	1961	17483	487	90 9
	1962	19157	530	91.3
1st Qtr.	1963	4891	135	94.0
2nd Qtr.	1963	5301	147	90.7
3rd Qtr.	1963	5480	152	91.3
Gillette Motor Transport	1959	6636	227	89.1
	1960	6548	222	97.4
	1961	7146	242	97.3
	1962	8003	276	94.3
1st Qtr.	1963	1939	67	89.5
2nd Qtr.	1963	2118	73	94.2
3rd Qtr.	1963	2165	70	94.5
Illinois-California Express	1959	15705	290	88.5
	1960	25266	640	93.1
	1961	26046	546	92.6
	1962	27434	564	92.6
1st Qtr.	1963	6805	133	97.7
2nd Qtr.	1963	7218	143	94.2
3rd Qtr.	1963	7892	156	93.4
Lee Way Motor Freight Lines	1959	12678	464	89.7
	1960	12205	445	98.8
	1961	16148	533	96.7
	1962	16435	539	95.8
1st Qtr.	1963	3984	131	98.5
2nd Qtr.	1963	4359	147	94.9
3rd Qtr.	1963	4540	149	98.1

CARRIERS			Revenue	Tonnage	Operating Ratio
Missouri Consolidated—See Knaus Truck Lines for 1959 and 1960		1961	4044	135	111.7
		1962	4290	126	88.3
	1st Qtr.	1963	1256	36	91.1
	2nd Qtr.	1963	1404	37	88.5
	3rd Qtr.	1963	1329	33	85.8
Navajo Freight Lines		1959	26571	578	91.2
		1960	27870	582	97.7
		1961	28820	636	95.3
		1962	30248	609	97.2
	1st Qtr.	1963	7028	124	98.9
	2nd Qtr.	1963	7601	136	96.2
	3rd Qtr.	1963	8201	167	94.3
Pacific Intermountain Express		1959	62517	2993	94.4
		1960	58304	2704	97.2
		1961	60215	2570	94.3
		1962	65499	2721	94.0
	1st Qtr.	1963	16063	666	97.2
	2nd Qtr.	1963	16909	689	93.6
	3rd Qtr.	1963	18380	763	93.4
Ringsby Truck Lines		1959	16422	335	98.7
		1960	17163	379	97.0
		1961	19041	400	95.0
		1962	20772	438	95.3
	1st Qtr.	1963	4964	104	95.9
	2nd Qtr.	1963	5517	110	95.2
	3rd Qtr.	1963	5638	111	95.8
Roadway Express		1959	65510	1543	93.1
		1960	70719	1639	92.2
		1961	78106	1748	91.9
		1962	88716	1929	90.6
	1st Qtr.	1963	20389	440	93.8
	2nd Qtr.	1963	22638	489	89.3
	3rd Qtr.	1963	22536	480	89.3

CARRIERS		Revenue	Tonnage	Operating Ratio
Southwestern Transportation Co.	1959	7416	333	91.1
	1960	7205	323	93.7
	1961	7148	290	95.6
	1962	7984	298	98.9
1st Qtr.	1963	1913	71	99.5
2nd Qtr.	1963	2135	79	94.8
3rd Qtr.	1963	2280	85	96.6
Texas-Arizona Motor Freight	1959	6902	154	88.8
	1960	7316	161	96.4
	1961	6808	145	92.8
	1962	7081	144	95.5
1st Qtr.	1963	1813	37	94.5
2nd Qtr.	1963	1833	37	94.8
3rd Qtr.	1963	1891	36	95.2
Transcon Lines	1959	19347	355	90.8
	1960	22570	452	94.9
	1961	23978	460	90.8
	1962	26519	470	87.1
1st Qtr.	1963	6792	113	88.8
2nd Qtr.	1963	7669	123	85.6
3rd Qtr.	1963	8126	128	84.3
Viking Freight Company	1959	14313	511	94.3
	1960	14308	518	97.1
	1961	15545	545	94.9
	1962	17774	605	96.6
1st Qtr.	1963	4330	145	99.8
2nd Qtr.	1963	4714	156	93.5
3rd Qtr.	1963	4834	158	93.6
Voss Truck Lines	1959	2405	77	95.4
	1960	2227	73	98.8
	1961	2384	79	92.6
	1962	2779	100	95.5
1st Qtr.	1963	700	25	111.8
2nd Qtr.	1963	795	29	100.1
3rd Qtr.	1963	846	22	86.7

CARRIERS		Revenue	Tonnage	Operating Ratio
Watson Brothers Transportation Company	1959	41097	1128	96.6
	1960	38139	1030	100.4
	1961	50039	1376	98.3
	1962	48697	1226	103.5
1st Qtr.	1963	9973	255	105.6
2nd Qtr.	1963	9092	208	99.8
3rd Qtr.	1963	9365	183	96.1
Western Truck Lines	1959	12686	391	97.0
	1960	13202	388	100.4
	1961	13900	395	99.4
	1962	14933	405	99.3
1st Qtr.	1963	3826	103	91.9
2nd Qtr.	1963	3841	105	96.1
3rd Qtr.	1963	4022	101	97.3
Wilson Truck Co.	1959	11394	354	93.6
	1960	11035	342	95.4

(Included with Watson Bros. for 1961, 1962, and 1963)

Source: Carrier Reports, Annual and Quarterly.

APPENDIX E

COMPARATIVE REVENUES, TONNAGES AND OPERATING RATIOS OF PROTESTANT CARRIERS FOR 1962, 1963, AND 1964

Add 000 to all Columns except Operating Ratio

CARRIERS		Revenue	Tonnage	Operating Ratio
Be-Mac Transport Company	1962	7054	267	91.5
	1963	7365	278	91.7
	1964	8032	306	92.2
Campbell Sixty-Six Express	1962	18331	637	92.3
	1963	19362	664	92.6
	1964	20941	708	93.0
Consolidated Forwarding	1962	9083	300	94.8
	1963	9543	309	95.2
	1964	9928	324	97.4
Consolidated Freightways, Inc.	1962	85215	5217	98.9
	1963	117423	4933	98.7
	1964	124922	4913	95.3
Denver Chicago Trucking Co.	1962	43838	672	91.1
	1963	45150	667	90.9
	1964	48481	687	89.7
East Texas Motor Freight Lines	1962	19157	530	91.3
	1963	20901	579	92.1
	1964	22828	640	91.3
Illinois-California Express	1962	27434	564	92.6
	1963	29305	577	95.3
	1964	31159	594	94.0

CARRIERS		Revenue	Tonage	Operating Ratio
Lee Way Motor Freight Lines	*1962	20382	694	96.5
	1963	21699	680	95.3
	1964	23979	768	94.4
Missouri Consolidated	1962	4290	126	88.3
	1963	5308	139	87.1
	1964	6396	164	75.1
Navajo Freight Lines	1962	30248	609	97.2
	1963	30497	538	96.4
	1964	31654	488	99.0
Pacific Intermountain Express	1962	65499	2721	94.0
	1963	68036	2833	95.1
	1964	69579	2833	93.8
Ringsby Truck Lines	1962	20772	438	95.3
	1963	21651	432	95.4
	1964	23215	444	94.8
Roadway Express	1962	88716	1929	90.6
	1963	101243	2067	89.6
	1964	109660	2224	90.0
Southwestern Transportation Co.	1962	7984	298	98.9
	1963	8507	319	96.4
	1964	9093	338	95.4
Texas-Arizona Motor Freight	1962	7081	144	95.5
	1963	7314	147	95.9
	1964	7427	150	95.1
Transcon Lines	1962	26519	470	87.1
	1963	30303	479	84.4
	1964	32359	486	84.4
Viking Freight Company	1962	17774	605	96.6
	1963	18513	612	96.4
	1964	19338	630	98.0

*Combined with Lee Way Motor Freight of Indiana

CARRIERS		Revenue	Tonage	Operating Ratio
Watson-Wilson Transportation Company	1962	48697	1226	103.5
	1963	37615	837	99.9
	1964	33730	703	100.4
Western-Gillette	*1962	25775	784	96.7
	1963	26789	778	96.5
	1964	29516	702	95.9
A.T. & S.F. Railway Company	1962	507347	—	79.1
	1963	513113	—	80.5
	1964	533524	—	80.2

*Combined for Western, Gillette and Voss

Source: Carrier Reports, Annual, 1962, 1963 and 1964.

SUPREME COURT, U. S.

FILED

DEC 1 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 790

BRASWELL MOTOR FREIGHT LINES, INC., AND CLARINDA K. SHAYLER, INDIVIDUALLY, AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, PACIFIC INTERMOUNTAIN EXPRESS CO., DC INTERNATIONAL, INC., WATSON-WILSON TRANSPORTATION SYSTEM, INC., RINGSBY TRUCK LINES, INC., IML FREIGHT, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS, INC. AND TRANSCON LINES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

MOTION TO AFFIRM.

DAVID AXELROD,
ARNOLD L. BURKE,
39 South LaSalle Street,
Chicago, Illinois 60603,
CEntral 6-9375,

Counsel on behalf of Appellees, Pacific Intermountain Express Co., DC International, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., IML Freight, Inc., Consolidated Freightways Corporation of Delaware, and Illinois-California Express, Inc.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MOTION TO AFFIRM

On Behalf of Appellees, Pacific Intermountain Express Co., DC International, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., IML Freight, Inc., Consolidated Freightways Corporation of Delaware, and Illinois-California Express, Inc.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument.

I. STATEMENT.

Appellants in their Jurisdictional Statement have set forth the citations to the opinion below and the statutes which provide for appeals from decisions of the Interstate Commerce Commission to statutory three-judge District Courts and thereafter to the United States Supreme Court. Appellants have also set forth the various statutes applicable in the instant matter.

Appellant Braswell operates as a motor common carrier transporting general commodities over regular routes extending between Oklahoma City and Tulsa, Oklahoma; Memphis, Tennessee and New Orleans, Louisiana, on the east, and Los Angeles, California on the west, serving innumerable intermediate points such as Jackson, Natchez and Vicksburg, Mississippi; Baton Rouge, Monroe and Shrevesport, Louisiana; Dallas, Fort Worth, Houston, San Antonio and El Paso, Texas; and Phoenix, Tucson and Yuma, Arizona. Shayler, which Braswell is seeking authority to acquire, holds authority to transport general commodities over a number of regular and irregular routes between Oklahoma City and points in Oklahoma within 125 miles of Oklahoma City, on the one hand, and, points in Illinois (including Chicago), Indiana, and certain Missouri points (including St. Louis), on the other.

By acquiring Shayler and adding the Shayler operating authority to its own in the name of Braswell, Braswell, among other things, sought to create a new single-line carrier between points in California, and points in Arizona on the west (via Oklahoma City), to points in Indiana and Illinois, on the east. The combination of the involved operating authorities also granted to Braswell single-line

authority between Texas points, for example, and points served by Shayler in Illinois and Indiana, not here in issue.

Appellees herein took the position at the various hearings before the Interstate Commerce Commission and during the proceeding before the District Court that neither Shayler, the vendor, nor Braswell, the vendee, had ever participated in traffic moving between points in Arizona and California, on the one hand, and the Shayler points, such as Chicago and St. Louis, on the other. The Commission, and subsequently the District Court, sustained this position with the result that a restriction was imposed upon the granting of the authority to purchase sought by Braswell which precludes Braswell from performing single-line service between Arizona and California, on the one hand, and the Shayler territory, on the other.

II. QUESTION PRESENTED.

The sole question presented by appellants is whether the Commission's restriction prohibiting Braswell from instituting a new single-line service between Arizona and California, on the one hand, and Illinois, Indiana and Missouri, on the other, is in accordance with applicable principles of law, as set forth in prior decisions of the Commission and the Courts.

III. ARGUMENT.

The decision of the District Court is plainly correct. The Commission, various District Courts, and this Court have very often enunciated and applied the principles of law which have been applied in this case. In reviewing the findings of the Commission which sustain the imposition of the restriction complained of, we shall also be answering appellants' allegations that the Commission failed to make requisite findings.

The Commission found that neither the vendor nor vendee had participated in traffic between Arizona and California, on the one hand, and the Shayler points, on the other. Referring to one exhibit introduced at the proceeding, the Commission stated that it:

> "Covers over 6,000 shipments, shows that vendor handled only 13 shipments which originated at, or were received from connecting carriers at Chicago, Oklahoma City or St. Louis, having origins or destinations in Arizona or California. Of these, three shipments, with an aggregate weight of 14,394 pounds were destined to California points, 9 shipments with an aggregate weight of 2,982 were originated in California, and one shipment weighing 315 pounds was originated at Tucson, Arizona" (Jurisdictional Statement B-22—B-23).

Referring to still another exhibit, ostensibly depicting traffic interchanged between appellants, the Commission found:

> "A single shipment weighing 357 pounds was destined to California, 4 shipments with a combined weight of 1,397 pounds originated at Tucson, 6 shipments with a combined weight of 1,212 pounds originated at Phoenix, and 10 shipments with a combined weight of

3,285 pounds originated at California points" (Jurisdictional Statement B-23).

Taking cognizance of vendor's interchange of traffic preceding the temporary authority during May, June and July of 1962, the Commission notes "None of this traffic was originated at or destined to points in Arizona or California" (Jurisdictional Statement B-24). Thereafter the Commission found:

> "Evidence of the scope of vendor's operations in connection with traffic interlined from and to Arizona and California points indicates *that such traffic constituted an infinitesimal part of vendor's total operations and was of no competitive significance to protestants or other carriers in the area*" (Jurisdictional Statement B-26).

Based on these basic findings, the Commission properly concluded:

> "It is clear, on the evidence before us, that service proposed by vendee from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are entitled to protection from establishment of additional competition" (Jurisdictional Statement B-26).

Appellants in their Jurisdictional Statement, never dispute these basic findings which correctly resulted in the Commission's conclusion that neither vendor nor vendee prior to the instant transaction participated in the handling of traffic between Arizona and California, on the one hand, and the Shayler territory (Indiana, Illinois and Missouri), on the other. Appellants instead urge that they should be allowed to institute a new service between said points merely because some of the carriers which serve between the involved areas are operating at a profit.

In this connection, appellants argue that the Commission committed error in refusing to take notice of all of the operating ratios of opposing carriers. Obviously, such evidence is not determinative of the issues involved, and moreover, the mere fact that a carrier is operating profitably throughout its system does not in any way justify a finding or conclusion that its operations between the points involved in the instant matter are profitable. Thus the evidence, even if admitted, would not prove what appellants sought to prove, namely that existing carriers were operating profitably between the involved points.

Having found that appellants proposed a new service, the Commission in accordance with applicable principles of law, turned to the issue of whether there was a public need for such service so that authorizing the institution of such service would be in the public interest. Since appellants offered virtually no evidence of a need for service between Arizona and California, and the Shayler territory, the Commission concluded that there was no such need and that the public interest would therefore not be served by instituting this new service.

In stating *the first two questions presented,* appellants have attempted to turn the issue around and have this Court hold that the Commission should have required opposing carriers to assume the burden of establishing that the instant transaction was not in the public interest. Section 5(2) of the Act clearly provides that the proponents of a transaction must establish that it is in the public interest. The Commission did not therefore misapply Section 5(2) nor did it fail to make adequate findings in accordance with the requirements of the Administrative Procedure Act, 5 U. S. C. 1007 (b).

In the third question presented, appellants attempt to convince the Court that the proposed service between Ari-

zona and California and the Shayler territory "is an improvement of an existing service." The findings of the Commission clearly refute this and demonstrate in further answer to question No. 3 that there would be no compensatory public benefits by the institution of a new service.

Answering Question No. 4 propounded by the appellants, the Interstate Commerce Commission and the District Court did not ignore the statutory standards set forth in Section 5(2) of the Interstate Commerce Act or Section 8(b) of the Administrative Procedures Act (5 U. S. C. 1007(b)); and neither the District Court nor the Commission were misled into believing that the proposed service between Arizona and California, and the Shayler territory was merely an improvement of an existing service with public benefits. The explicit findings, in accordance with the Administrative Procedure Act, and based upon the record are exactly to the contrary. That service would be entirely new and there was no evidence of record to substantiate an assertion that it would have any compensatory public benefit.

In Question No. 5 the appellants raise the issue of whether the Commission erred in refusing to take official notice of certain financial statements filed by these appellees and other opposing carriers. The implication in this question and in the argument in support of it being that these financial statements show that operating revenue from their entire operations would somehow be determinative of the issue of whether the new service instituted by appellants would have an adverse effect upon competitors. The argument propounded in support of this issue is so illogical that it does not require consideration by this Court. By taking official notice of the operating revenues and operating ratios of all of these appellees and others, the Commission could make no finding concerning the adverse effect of appellants' new service between Arizona-

California and the Shayler territory. Instead, the Commission looked to the evidence of record indicating that these appellees and other opposing carriers were transporting the traffic in question prior to the time Braswell obtained temporary authority to operate Shayler, and that thereafter a substantial portion of the traffic, indeed a "startling" amount of traffic had been diverted to appellants. Since the evidence set forth in Appendix E could have no affect upon the findings of the Commission, there was no error in refusing to admit it. This was offered to the Commission after the close of the hearing without any satisfactory reason being offered for the late tender.

The general principles of law applicable when one carrier purchases another and seeks, among other things, to institute a new service at least in part, have been discussed by the Commission and the Courts on innumerable occasions. The Interstate Commerce Commission has consistently refused to approve the purchase of a motor carrier's operating rights under Section 5(2) of the Interstate Commerce Act where a new service would result, in the absence of a showing similar to that required under Section 207 of the Act, that there is a public need for such service and that therefore approval is in the public interest. That application of the law has been approved on innumerable occasions by Federal Courts. *Shein* v. *U. S.*, 102 F. Supp. 320 affirmed 343 U. S. 944 (1952); *Great Coastal Express, Inc.* v. *U. S.*, 243 F. Supp. 943, affirmed 382 U. S. 369 (1966); *Houff Transfer* v. *U. S.*, 105 F. Supp. 851 (1952). See also as an example of an Interstate Commerce Commission decision, other than the ones at hand, *Pope—Purchase Hill & Burdick*, 90 M. C. C. 70.

Section 8(b) (5 U. S. C. Sec. 1007(b)) of the Administrative Procedure Act does require that the Commission make a written report setting out its findings, conclusions and decision together with reasons therefor. There is no require-

ment, however, that the Commission make the detailed findings of fact required by Rule 52(a) of the Federal Rules of Civil Procedure. See *Chicago & I. I. RR.* v. *U. S.*, 107 F. Supp. 118, affirmed 344 U. S. 917 (1953). If the Commission's report contains subsidiary findings of fact sufficient to lend adequate and rational support to its order, the Court will uphold the Commission's conclusions. *Alabama Great Southern RR.* v. *U. S.*, 340 U. S. 216 (1951); *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946).

In *Luckenbach S. S. Co.* v. *U. S.*, 122 F. Supp. 824 affirmed 347 U. S. 984 (1954), Judge Augustus N. Hand stated:

> "It is only necessary that the essential basis of the Commission's order appear in the report so that the Court can satisfy itself that the Commission has performed its function."

See also *Yemish* v. *Barber*, 232 F. 2d 939 (C. A. 9; 1956); *Jaffke* v. *Dunham*, 352 U. S. 280 (1957); *U. S.* v. *Rose*, 346 F. 2d 985 (1965).

The Examiner's Recommended Order and the Commission's decision make detailed findings of fact, both indicating that the proposed service between Arizona and California, on the one hand, and the Shayler territory, on the other, would be new, the Commission disagreeing with the Examiner only to the extent of concluding that because it is new, there should be a restriction against it, absent evidence that the new service was needed and therefore in the public interest.

Indeed, the Commission analyzes the operations of appellants before and after the issuance of temporary authority to Braswell to operate Shayler. Having made such an analysis, the Commission comes to the inevitable conclusion that approval of the transaction without restriction would create a new service and divert traffic from existing

carriers. The Commission, therefore, either by adopting the findings of its Examiner or in its own decision, indicates that it considered (1) the past operations of appellants, (2) evidence concerning a need for a new service, and (3) the adverse effect upon existing carriers which such a new service would have. All of these are mentioned in the Commission's report which, when read with those portions of the Examiner's report which have been adopted, indicate full consideration of all of the issues and complete compliance with the provisions of the Administrative Procedure Act. Indeed, as recently as December of 1966, another United States District Court has had occasion to review the law substantially as set forth immediately above and to approve imposition by the Commission of a restriction similar to the one imposed in the instant matter. See *Key et al.* v. *U. S. et al.*, 263 F. Supp. 544 (DC Ind. 1966). The analysis of the law by the District Court in Indiana in the *Key* case and the analysis of the law by the District Court in this case are identical. Both Courts review prior decisions of this Court considering precisely the same issues and come to the same conclusions.

IV. CONCLUSION.

Appellants have failed to set forth any issue substantial enough to warrant further consideration by this Court. All of the issues presented have been discussed and considered by this Court in prior decisions. Two District Courts, the one in the instant matter, and the Indiana Court, within six months of each other reviewed the issues involved and decisions of this Court relative thereto and came to the same conclusion, namely that when a new service will result from the purchase of one carrier by another, absent the showing of a public need for such service, it will not be deemed in the public interest. The law is clear and therefore the District Court's judgment and decree should be affirmed without further argument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

NO. 790

BRASWELL MOTOR FREIGHT LINES, INC., CLARINDA K. SHAYLER, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, TRANSCON LINES, ET AL.,
Appellees

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IN THE

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NO. 790

BRASWELL MOTOR FREIGHT LINES, INC., CLARINDA K. SHAYLER, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, TRANSCON LINES, ET AL.,

Appellees

On Appeal From The United States District Court For The Western District of Texas

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellee Transcon Lines moves that the judgment of the District Court be affirmed because it is manifest that the question presented is so unsubstantial as not to need further argument.

STATEMENT

The judgment of the three-judge District Court sought to be reviewed on this appeal incorporates the District Court's opinion (Appendix A to Jurisdictional Statement and 1966-1967 F.C.C. ¶81,938). The opinion of the District Court accurately states the

nature of the case, quotes the statutes involved and clearly discusses and disposes of the only question presented by the appeal (designated as "the crucial question" and "the core of the case" in the Jurisdictional Statement at pages 9-11). A complete statement of the pertinent and undisputed findings of fact by the Commission concerning the nature and extent of applicants' past services and the new service to and from California and Arizona that would result from unconditional approval (Appendix B to the Jurisdictional Statement at B-22 to B-25 and 101 M.C.C. at 14-16) is specifically incorporated by reference into the District Court's opinion as are the Commission's basic findings and reasons for imposing the disputed approval condition which would prohibit new service to and from California and Arizona (Appendix B to Jurisdictional Statement at B-26 to B-27 and 101 M.C.C. at 16-17).

THE QUESTION PRESENTED

In determining whether a unification proposed under Section 5(2) of the Act, 49 U.S.C. §5(2), is or is not consistent with the public interest is the Commission without authority to condition its approval so as to prohibit authorization of new competitive services not shown to be required by public need?

ARGUMENT

The judgment of the District Court affirming the Commission's order is clearly correct for the reasons therein stated. Section 5(2)(b), 49 U.S.C. §5(2)(b), authorizes approval of transactions covered thereby

on a limited and conditional basis if a limited approval rather than a full approval is all that is shown to be consistent with the public interest and further provides that if a given transaction is found only in part to be consistent with the public interest the Commission

> ". . . shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modification, so found to be just and reasonable."

Essentially appellants argue that public need, or absence of public need, for a new competitive transportation service resulting from unification of existing certificates cannot be lawfully considered in determining consistency with the public interest because, appellants say, "public interest" as used in Section 5(2) has been defined in *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370 (1944), or elsewhere, so as to make "public interest" and "public need" concepts and criteria mutually exclusive. Particularly, appellants say in substance that "public interest" has been restrictively defined to preclude consideration in a Section 5 case of whether new competitive services resulting from a unification would or would not be responsive to a public need for adequate service not available from existing carriers.

But the exact opposite is true. Long before the decision in *McLean* and long prior to Congress' express declaration of the National Transportation Policy[1]

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[1]54 Stat. 899, 49 U.S.C.A. note preceding Section 301 (". . . to promote safe, adequate, economical, and ef-

this Court had determined that the "public interest" concept of Section 5 has direct relation to "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25, 53 S.Ct. 45, 48 (1932).

Accordingly, as pointed out by the District Court, in *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*, 57 M.C.C. 341, 380 (Full Com., 1950), *affirmed*, 57 M.C.C. 467 (Full Com., 1951), and in hundreds of Section 5 cases before and since, the Commission has found that the public interest required disapproval in whole or in part of a proposed unification where new competitive service would result without a showing that such resulting new service would be responsive to a public need for adequate service not being met by existing carriers.[2] In most of these cases, as in the present

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ficient service and foster sound economic conditions in transportation and among the several carriers . . . all to the end of developing, coordinating and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States. . . .")

[2]The following are representative of the Commission's consistent holdings (in addition to *North American*, 93 M.C.C. 125 (Div. 3, 1963), cited in the Commission report under review) requiring proof of public need in Section 5 cases to warrant either reactivation, transfer and unification or any other new competitive use of vendor's certificated rights. *Compare Crichton*, 35 M.C.C. 661, 664 (Div. 4, 1940) and *Quaker City*, 38 M.C.C. 603 (Full Com., 1942) *with*

case, the resulting and proscribed new service would have come about through reactivation of dormant or unused authority of the seller so as to provide a new single-line service in conjunction with the rights of

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Adkins, 38 M.C.C. 240, 243 (Div. 4, 1942); *Reinhardt*, 38 M.C.C. 665, 669 (Div. 4, 1942); *Falwell*, 40 M.C.C. 439 (Full Com., 1946), *affirmed*, *Falwell v. United States*, 69 F.Supp. 71, 6 F.C.C. ¶80,378 (W.D. Va., 1946), *aff'd per curiam*, 330 U.S. 807, 67 S.Ct. 1087 (1947); *La Mere*, 55 M.C.C. 501 (Div. 4, 1949); *Transcon*, 56 M.C.C. 521 (Full Com., 1950); *Shein*, 56 M.C.C. 711 (Div. 4, 1950), *affirmed*, *Shein v. United States*, 102 F.Supp. 320, 8 F.C.C. ¶80,734 (N.J., 1951), *aff'd per curiam*, 343 U.S. 944, 72 S.Ct. 1043 (1952); *Houff*, (not printed), *affirmed*, *Houff Transfer, Inc. v. United States*, 105 F. Supp. 851, 9 F.C.C. ¶80,800 (W.D. Va., 1952); *Cooper*, 58 M.C.C. 283 (Full Com., 1952); *Adley*, 65 M.C.C. 457, 493 (Div. 4, 1955); *Denver-Chicago*, 70 M.C.C. 309 (Div. 4, 1956); *Ratner*, 70 M.C.C. 251 (Div. 4, 1956), *affirmed*, *Ratner v. United States*, 162 F.Supp. 518, 12 F.C.C. ¶81,164 (S.D. Ill., 1957), *aff'd per curiam*, 365 U.S. 368, 78 S.Ct. 913 (1958); *C & H*, 80 M.C.C. 33 (Div. 4, 1959); *Kings*, 85 M.C.C. 110 (Full Com., 1960); *Red Star*, 87 M.C.C. 175 (Div. 4, 1961); *Bowman*, 90 M.C.C. 303 (Div. 3, 1961); *C & H*, 93 M.C.C. 741 (Div. 3, 1964), *affirmed*, *C & H Transportation Co. v. United States*, 249 F.Supp. 97, 16 F.C.C. ¶81,781 (N.D. Tex., 1965); *Hennis*, (not printed), *affirmed*, *Key v. United States*, 263 F.Supp. 544, 1966-1967 F.C.C. ¶81,876 (S.D. Ind., 1966); *Great Coastal*, 97 M.C.C. 271 (Div. 3, 1964), *affirmed*, *Great Coastal Express, Inc. v. United States*, 243 F.Supp. 943, 16 F.C.C. ¶81,753 (E.D. Va., 1965), *aff'd per curiam*, 382 U.S. 369, 86 S.Ct. 546 (1966); *Fober*, 97 M.C.C. 668 (Fin. R.B., 1965), *affirmed*, *Glosson Motor Lines, Inc. v. United States*, 271 F.Supp. 467, 1966-1967 F.C.C. ¶81,945 (M.D. N.C., 1967).

the purchasing carrier. The Commission's rationale in *Transcon* is typical.[3]

As noted, a number of these Commission decisions in Section 5 cases wherein the public interest was found to require total or partial disapproval on account of applicants' failure to prove public need for a proposed new unified service have been affirmed on review. The one case affirming the Commission's use of public need criteria to determine public interest which is most similar on its facts to the instant case was cited by the District Court below. *C & H Trans-*

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[3] *Transcon Lines—Purchase (Portion)—Anderson Motor Service Co.*, 56 M.C.C. 521, 555 (Full Com., 1950):

> "In our opinion, the evidence adduced from shippers in both proceedings indicates a prefeerence for the services of Transcon and O. K. Trucking, rather than a real need for the services, and is not a sufficient basis upon which to approve the transactions resulting in additional services. Carriers that have expended their funds and energies in developing and maintaining facilities to handle all available traffic are entitled to protection against the purchase of operating rights under which operations have been abandoned, for the institution of a new service in competition with them. Such protection should be afforded, not only for the protection of the carriers themselves, but also to promote stability and sound economic conditions in the industry and the rendition of adequate transportation service to the public."

portation Co. v. United States, 249 F.Supp. 97, 16 F.C.C. ¶81,781 (N.D. Tex., 1965).'

'In *C & H* the court observed in this connection (249 F.Supp at 99-100:

> "We hold that the evidence in the record clearly sustains the Commission's findings that the routes were dormant and that C & H Transportation Company failed to meet its burden of demonstrating operations by the vendor on those routes.
>
> "Once dormancy has been found, the purchasing carrier has the burden of proving a public need for his service in order to justify the reactivation of dormant routes. Logically, the Commission then requires the same degree of proof in an application to reactivate routes wholly unused as in this case as it would in an application for new routes. See Note, *Federal Regulation of Trucking: The Emerging Critique*, 63 Colum. L. Rev. 460, 489 n. 177 (1963). The purchaser's obligation here would be to 'demonstrate by shipper testimony that a need for additional service is present or immediately foreseeable—and, conversely, upon protest of authorized carriers, that the existing service offered is physically incapable of meeting shipper demands.' Note, *Federal Regulation of Trucking, supra*, 63 Colum. L. Rev. at 469. *Accord, T.S.C. Motor Freight Lines, Inc. v. United States* [14 FEDERAL CARRIERS CASES ¶81,336], 186 F.Supp. 777 (S.D. Tex 1960), *aff'd per curiam sub nom., Herrin Transp. Co. v. United States*, 336 U.S. 419 (1961)."

CONCLUSION AND PRAYER

For the foregoing reasons appellee submits that this appeal presents no substantial question warranting oral submission and full consideration. Therefore, the judgment of the District Court should be affirmed, and appellee so prays.

Respectfully submitted,

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PROOF OF SERVICE

I, Phillip Robinson, one of the attorneys for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1967, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage pre-

paid, to Hon. Ralph S. Spritzer, Acting Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas 78200; and to Hon. Mario J. Martinez, Assistant United States Attorney, El Paso, Texas 79900.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Manny H. Smith, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for appellants herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Max G. Morgan, Attorney, 450 American National Building, Oklahoma City, Oklahoma 73102; Ronald R. Calhoun, Attorney, 608 Southwest National Building, El Paso, Texas 79901; Christopher & Bailey, T. S. Christopher, Attorney, 2413 Continental Life Building, Fort Worth, Texas 76102.

4. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Attorney, Axelrod, Goodman & Steiner, 39 South LaSalle

Street, Chicago, Illinois 60603; and to Bruce Hallmark, Attorney, Goodman and Hallmark, Suite 13A, El Paso National Bank Building, El Paso, Texas 79901.

Phillip Robinson

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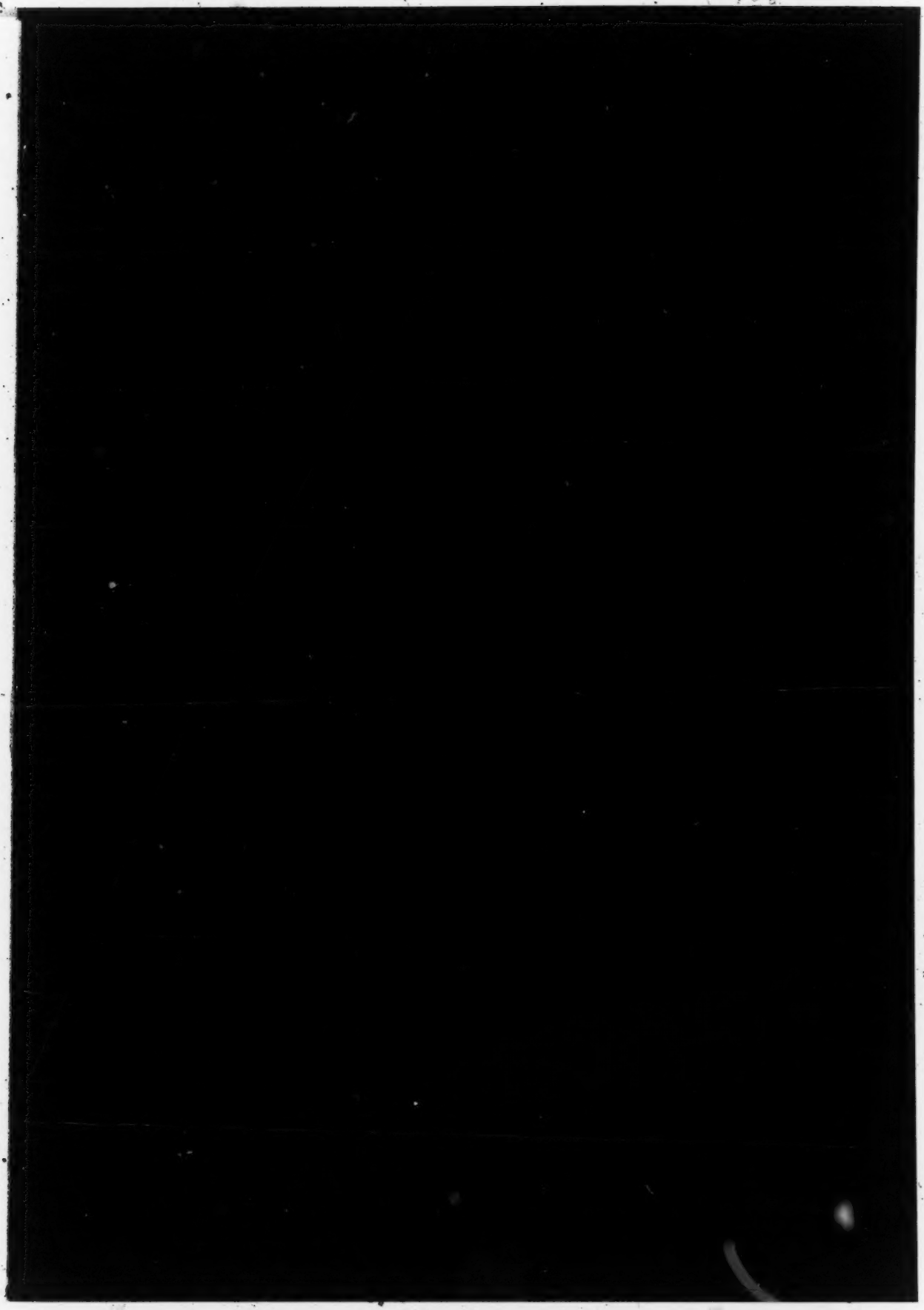

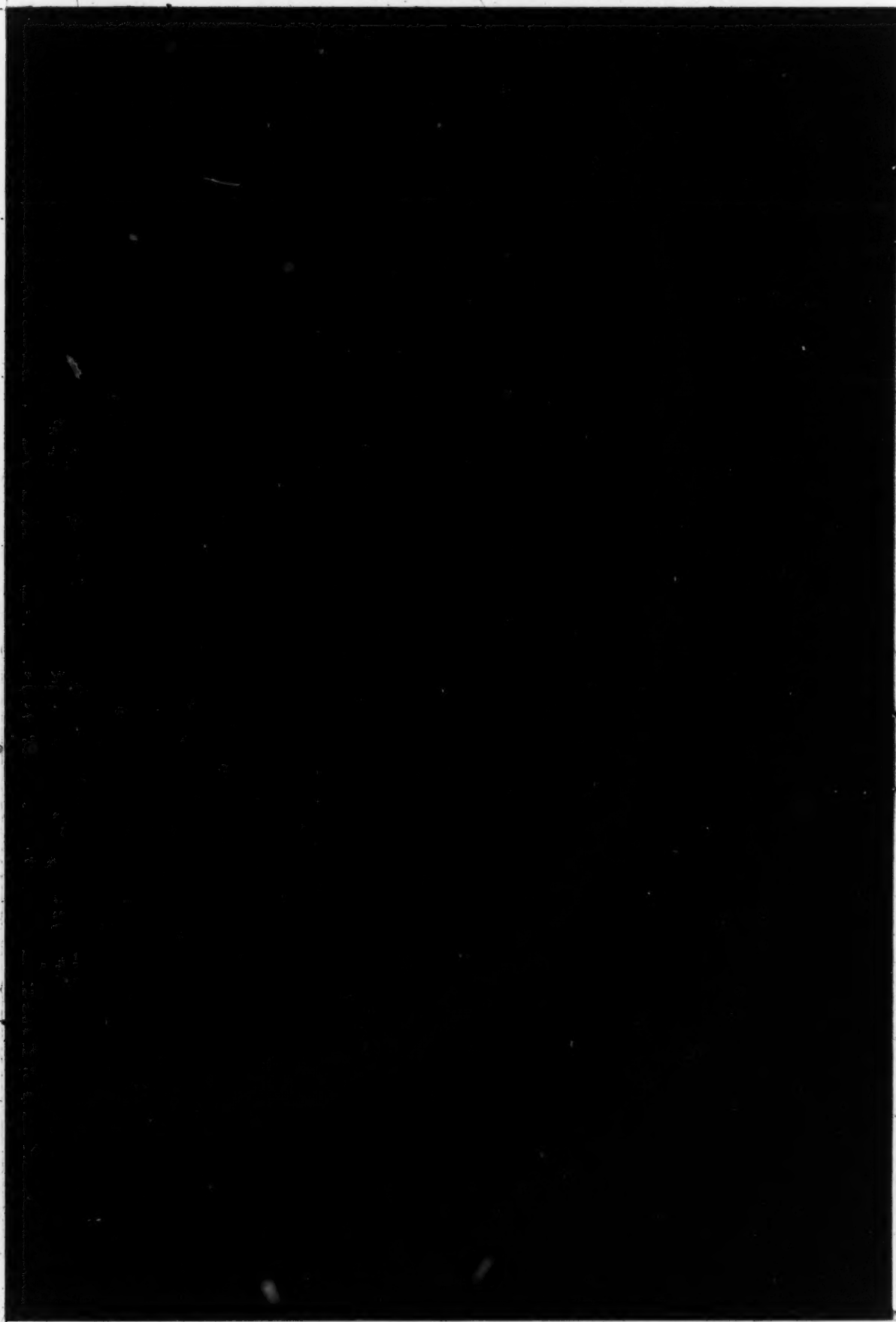

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 790

BRASWELL MOTOR FREIGHT LINES, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment and opinion of a three-judge district court (J.S. App. A) affirming a report and order of the Interstate Commerce Commission (J.S. App. B). The Commission approved, as consistent with the public interest, the purchase by Braswell Motor Freight Lines (Bras-

284-031—67

well)[1] of certain interstate operating rights (authorizing service basically between Oklahoma City, Oklahoma, and all points within 125 miles thereof, on the one hand, and the Chicago, Illinois, and St. Louis, Missouri, commercial zones, on the other) owned by Warren G. Shayler and W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix) ("Shayler rights"), pursuant to Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. 5(2)(a). The Commission made its approval subject to a restriction against Braswell's joining the rights acquired with any other operating rights it had previously held for the purpose of providing single-line service to or from points in Arizona and California. Appellants are Braswell and the executrix of the Shayler estate, which holds the Shayler rights, and it is only the validity of the Commission restriction on joinder of operating rights which they are challenging.

On February 11, 1963, Braswell filed its application for authority to purchase the Shayler rights. By an order of February 25, 1963, the Finance Board of the Commission granted Braswell's application under Section 210a(b) of the Act, 49 U.S.C. 310a(b), for temporary authority to lease the Shayler rights, and Braswell began such operations on March 18. Subsequently, the Finance Board extended Braswell's temporary authority until final determination of the

[1] Braswell is a motor common carrier of general commodities engaged in interstate commerce over regular routes, as here pertinent, between Dallas, Fort Worth and Houston, Texas, and Oklahoma City and Tulsa, Oklahoma, on the one hand, and El Paso, Texas, Phoenix, Arizona, and Los Angeles, California, on the other.

application for permanent Section 5 authority. After numerous motor carriers and the Class 1 rail carriers in the affected geographical area protested the permanent application, a hearing was held before a Commission examiner in November 1963. On December 29, 1964, the examiner recommended that the proposed purchase by Braswell of the Shayler rights be approved as consistent with the public interest. Thereafter, various protestants filed exceptions, to which applicants replied. In their reply applicants requested that the Commission notice officially the revenues, tonnage, and operating ratios of various protestants for the entirety of the years 1962–1964 (see J.S. App. E, where that data is reproduced).[2]

On December 20, 1965, the Commission, by its Division 3, issued its report and order approving the Braswell purchase of the Shayler rights subject to a joinder restriction against use of the unified rights for providing single-line service to or from points in Arizona and California. In imposing this restriction pursuant to the authority contained in Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b), the Commission found that during Braswell's unrestricted operation of the unified rights in the six-month period of temporary authority (March–September 1963), it had instituted a substantial volume of motor freight business to and from Arizona and California. It was further found that, due to Braswell's strong financial condition and ability

[2] Data in this regard for part of 1963 and for previous years was in the record before the Commission (see J.S. App. B, 26–27; J.S. App. C, 54–55).

to render single-line service to and from points in Shayler's territory, it could reasonably be expected to increase the quantity of transcontinental traffic from that which it had transported under the temporary authority. This would result, the Commission determined, in a new service by Braswell not theretofore performed by the owners of the Shayler rights, either in conjunction with Braswell or any other motor carrier. Where the institution of such a new service is proposed, the Commission pointed out, a need for the service must be shown by the applicants. Since Braswell had failed to prove that the existing service was inadequate or that there was a public need for such a new service, the Commission concluded that protestants were entitled to protection from the institution of additional competition (J.S. App. B, 26–27). In its report, the Commission declined to notice officially the data tendered by applicants pertaining to operations conducted subsequent to the completion of the hearing (J.S. App. B, 26).

Braswell and Shayler filed a petition for reconsideration and/or further hearing.[3] By an order of July 19,

[3] Attached to this petition was an Appendix A, which ~~protestants~~ applicants stated they would introduce at a further hearing if granted. This appendix purported to be an abstract of representative transcontinental shipments transported by Braswell in 1962 and early 1963 through the Oklahoma City, Tulsa, and Memphis gateways. Also attached to the petition was an Appendix B, a list of data for the various protestants for the years 1962–1964 and the first three quarters of 1965, similar to that for those portions of the years 1962–1964 (J.S. App. E) which the Commission had declined to notice officially. In their petition applicants requested that the Commission grant a further hearing to allow them to introduce such evidence or, in the alternative, notice officially the updated data contained in Appendix B.

1966, Division 3, acting as an Appellate Division, denied this petition. Thereafter, applicants filed a petition seeking a determination that an issue of general transportation importance was involved, which petition was denied by the Commission.

Appellants' action in the district court to set aside the Commission's report and order challenged only the validity of the joinder restriction (J.S. App. A, 3). The court below found that there was substantial evidence to support the Commission's findings that unrestricted approval of the purchase would result in a new transcontinental service for which Braswell had failed to prove a public need and, consequently, affirmed the Commission's approval of the transaction subject to the joinder restriction (J.S. App. A, 6–8). In addition, the court held that the Commission had not abused its discretion in denying applicants' petition for reconsideration and/or further hearing (J.S. App. A, 8–9).[4]

ARGUMENT

The decision below is correct, and this appeal presents no substantial question warranting plenary consideration by this Court.

[4] Although in affirming the Commission's report and order the court dissolved its temporary restraining order of December 2, 1966, which had stayed the orders of the Commission of December 20, 1965, and August 25, 1966, the Commission has not reinstated an effective date for these orders, pending the determination of this appeal. If not enjoined, these orders would have required consummation of the transaction subject to the joinder restriction (and termination of the unrestricted temporary authority) by December 26, 1966.

Appellants' jurisdictional statement raises, in essence, only two questions. Their primary contention is that, in approving the purchase subject to the joinder restriction upon the basis that applicants had failed to prove a public need for the proposed new service, the Commission erroneously applied the "public convenience and necessity" criterion of Section 207 of the Act, 49 U.S.C. 307, instead of the statutory test of "consistent with the public interest" contained in Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b). Such a contention has been previously raised in a number of similar cases and has been consistently rejected both by this Court and the district courts. *Great Coastal Express, Inc.* v. *United States,* 243 F. Supp. 943 (E.D. Va.), affirmed *per curiam,* 382 U.S. 369; *Ratner* v. *United States,* 162 F. Supp. 518 (S.D. Ill.), affirmed *per curiam,* 356 U.S. 368; *Shein* v. *United States,* 102 F. Supp. 320 (D.N.J.), affirmed *per curiam,* 343 U.S. 944; *Glosson Motor Lines, Inc.* v. *United States,* 271 F. Supp. 467 (M.D. N.C.); *Key* v. *United States,* 263 F. Supp. 544 (S.D. Ind.); *Houff Transfer* v. *United States,* 105 F. Supp. 851 (W.D. Va.). See also *Navajo Freight Lines, Inc.* v. *United States,* 186 F. Supp. 377 (D. Colo.), appeal dismissed, 320 F. 2d 912 (C.A. 10).

Appellants' other basic contention is that the Commission committed reversible error (1) in not giving controlling weight to the revenues, tonnage and operating ratios of protestants during the six months of Braswell's temporary operating authority—data in the record, (2) in refusing in its report to notice officially similar non-record data set out in applicants'

reply to protestants' exceptions (reproduced in J.S. App. E; see *supra*, pp. 3, 4), and (3) in denying their petition for reconsideration and/or further hearing in which they requested that the Commission either grant a further hearing for receipt of the data in Appendix B thereto or notice officially such evidence (see note 3, *supra*). This contention likewise is without merit.

While an administrative agency may take official notice of information not in the record, pursuant to Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e), nothing requires such a body to do so. Cf. *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133, 144. Nor is it determinative that the Commission has considered similar data—by taking official notice—in other proceedings or has given controlling significance to such data in the record in certain cases. See *Virginian Ry.* v. *United States*, 272 U.S. 658, 665–666; *Whitehouse Trucking, Inc.* v. *United States*, 261 F. Supp. 9, 11 (N.D. Ohio), affirmed *per curiam*, 388 U.S. 453; *Watkins Motor Lines, Inc.* v. *United States*, 243 F. Supp. 436, 443 n. 11 (D. Neb.); *U.S.A.C. Transport, Inc.* v. *United States*, 235 F. Supp. 689, 693 (D. Del.), affirmed *per curiam*, 380 U.S. 450; *Ace Lines, Inc.* v. *United States*, 197 F. Supp. 591, 599 (S.D. Iowa).[5] In addition, it is well settled that petitions for reconsideration or for further hearing are addressed to the

[5] In any event, as the district court correctly stated, the important question in the case was "not whether the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations but whether Braswell proved a public need for the new service" (J.S. App. A, 7).

discretion of the administrative agency and that denial of such petitions is not open to question unless in clear abuse of discretionary authority. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514–515; *Glosson Motor Lines, Inc.* v. *United States, supra,* 271 F. Supp. at 473; *Watkins Motor Lines, Inc.* v. *United States, supra,* 243 F. Supp. at 443.[6]

Finally, appellants do not challenge the standard of judicial review which the court below applied (J.S. App. A, 5) in affirming the Commission's decision. See, *e.g., Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 138–140. Applying the correct standard, that court properly concluded that there was substantial evidence in the record to support the Commission's conclusion that it was consistent with the public interest to subject the proposed purchase by Braswell of the Shayler rights to the joinder restriction preventing use of the unified rights for the providing of a new transcontinental service from and to points in Arizona and California, absent a showing of public need for such service (J.S. App. A, 5–8).

[6] In holding that the Commission had not abused its discretion in denying the petition for reconsideration and/or further hearing (J.S. App. A, 8), the court below specifically referred only to the Commission's refusal to accept the evidence represented by applicants' Appendix A (see note 3, *supra*). However, the court's subsequent statement that "[a]ll points raised by plaintiff not touched upon herein are found to be without merit" (J.S. App. A, 9) shows that the court at least implicitly concluded that the Commission properly exercised its discretion in refusing to notice officially the data contained in Appendix B to the petition for reconsideration.

CONCLUSION

In light of the foregoing discussion, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BRASWELL MOTOR FREIGHT LINES, INC., ET AL,
Appellants

vs.

UNITED STATES OF AMERICA, ET AL, *Appellees*

On appeal from the United States District Court for the Western District of Texas.

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Appellants' Reply to Motions to Dismiss and to Affirm

The United States, Interstate Commerce Commission, and Pacific Intermountain Express Co., et al, have filed motions to affirm and Transcon Lines has filed motion to dismiss. This is in reply to all motions, each of which is without merit.

In the following statement and argument we propose to bring the deficiencies of the Commission's order, based upon its own decisions and under statutory standards, demands, and the National Transportation Policy, into sharp focus. For the questions presented are important. And so far as we can find, this Honorable Court has never been faced with the questions as here presented.

Moreover, the basic findings essential to the validity

of a given order will vary with the statutory authority invoked and the context of the situation presented.[1]

STATEMENT WITH ARGUMENT

This is a direct appeal from a final judgment of a statutory three judge District Court (Juris.Stmt., Appendix A). The Commission approved, in part, as consistent with the public interest, the purchase by Braswell Motor Freight Lines, Inc. (hereinafter called Braswell), of the operating rights and certificates of convenience and necessity owned by the Warren G. Shayler Estate, Clarinda K. Shayler, Executrix, the surviving spouse and sole heir, and W. Thurman Shayler, Guardian of his now long deceased father (all hereinafter called Shayler). The Commission refused, however, to permit joinder of the Braswell and Shayler end-to-end certificates at Oklahoma City to the extent that such joinder would permit the rendering of single-line service to Phoenix, Tucson and Yuma, Arizona, and to Los Angeles, California. We believe the trial court merely "rubber-stamped" the Commission without coming to grip with the issues and the questions here presented.

That refusal of joinder is the extent to which appellants challenge the Commission's order.

For the Examiner's findings as summarized by the Commission, see Appendix B, Jurisdictional Statement, pages B-5 and B-6. The Commission adopted

[1] *Alabama Great S.R.Co. vs. United States*, 340 U.S. 216, 228, and authorities there cited.

the findings of the Examiner to the following extent only:

The findings of fact, insofar as they relate to the *financial condition* of applicants, the *terms* of the proposed transaction, and *the operations of protestants, as set forth in the Examiner's report* "are adopted as our own without being restated . . ." (Juris.Stmt., Appendix B, page B-4).

This, as a matter of course, *left all* other *essential* findings on all other material issues to be made by the Commission.

The Commission did not make such other essential and material findings and the reasons therefor in the respects complained of. 5 U.S.C. 1007(b). This is patent on the face of the order and fatal thereto.

The Commission ignored the National Transportation Policy. This is patent on the face of the order.

The Commission has made clear the factors or elements that *must be considered* in a Section 5, acquisition, proceeding. They are: *"We must find;"*

(1) "That it will be consistent with the public interest, a concept which;"

(2) "Has direct relation to adequacy of transportation service;"

(3) "To its essential conditions of economy and efficiency;"

(4) "To appropriate provision and best use of transportation facilities;"

(5) The "interest of competing carriers;" and

(6) "That of shippers and consignees."

And the Commission explained that:

(1) It "*is our duty* to consider the effect which a proposed *new unified* service will have on the continuance, efficiency and economy of existing carrier services;"

(2) "If such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency and economy, to the detriment of the public;" then,

(3) "Whether it would result in offsetting advantages to the public;" and,

(4) "Whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Pacific Intermountain Express—Control—Keeshin, 57 M.C.C. at page 470.

The foregoing is a fair and accurate summation of the requirements of Section 5(2)(b) and (c) of the Interstate Commerce Act, *49 U.S.C. 5(2)(b) and (c)*, in the light of the demanding standards of that statute, of Section 8(b), *5 U.S.C. 1007(c)*, and of the National Transportation Policy.

In the case at Bar the Commission in denying unification, to the extent here complained of, *gave no consideration* to the relevant elements which it said "*We must find.*" We verily believe, as the Commission so said, that it "must" or that its order is void.

The Commission here, first, noticed what it called "an infinitesimal" amount of interline business (Juris. Stmt., Appendix B, page B-26); second, Braswell's "stronger financial condition" and the possibility "in all likelihood (to) increase, the amount of traffic now being handled under temporary authority" (Juris. Stmt., Appendix B, page B-26); and denied the unification, to the extent complained of, by concluding: "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California and our findings will be conditioned accordingly." (Juris.Stmt., Appendix B, page B-27).

The Commission addressed itself to no other elements essential to determination as it said "*We must* (do) *find.*"

In the light of Section 5(2)(b) and (c) and the National Transportation Policy, there is utter failure of compliance with Section 8(b), Administrative Procedure Act, *5 U.S.C. 1007(b)*, last sentence.

And the finding quoted next above is not only not supported by substantial evidence but is positively contrary to the evidence. Said finding runs squarely afoul of Section 8(b), *5 U.S.C. 1007(b)*, and Section 10(e) of the Administrative Procedure Act, *5 U.S.C. 1009(e)*. As to Section 10(e), it is particularly violative in the following:

> "10(e). So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

> tional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. *It shall* . . . (B) *hold unlawful and set aside* agency action found to be (1) *arbitrary, capricious, an abuse of discretion* or otherwise not in accordance with law; . . . (5) *unsupported by substantial evidence* in any case subject to the requirements of sections 1006 and 1007 of this title . . . (6) *unwarranted by the facts* . . . In making the foregoing determinations the court shall review the whole record or such portion thereof as may be cited by any party, and *due account shall be taken of the rule of prejudicial error.*" (Emphasis supplied)

The facts with reference to the foregoing statutory requirements are, taking them in a somewhat inverted order, that:

(a) The only tangible, reliable and undisputed evidence shown at the time of hearing is that Braswell had been operating in competition with intervening appellees for the period March 18, 1963, to date of hearing, beginning November 4, 1963. From *the record evidence* the Examiner compared operating ratios of protesting motor carriers for the year 1962 with their operating ratios for the first three quarters of 1963, during which three-quarters (or most of them) of those protestants, including appellees-intervenors here, *and found no adverse effect.* Based upon the record as a whole, there was *none.* See Juris.Stmt., page 16, footnote 3, collated from the evidence. Appellees-intervenors' operating ratios were just as good, and in some instances better, with Braswell's competition,

as without it.[2] This clearly established no adverse effect.

From the entire *record evidence, only one conclusion* can be drawn, i.e., the Commission's finding, as quoted above and to which this is addressed, *is false.* It is not supported by substantial evidence. The evidence establishes the contrary. And it comes within the statutory condemnation of Section 10(e)(B)(1), (3), (5), (6), and the last sentence of said section setting out the "rule of prejudicial error." The order is void and must be set aside.

The Commission *never* addressed itself to other elements essential to adjudication as it says *"We must"* in *Pacific Intermountain Express, Co.—Control—Keeshin,* 57 M.C.C. at page 470. For this the Commission and its order are condemned by Section 8(b), Administrative Procedure Act, *5 U.S.C. 1007(b),* last sentence. For this the order is void and must be set aside.

Remember that the Commission adopted the *findings* of the Examiner *in respect to only three findings,* to which we have heretofore directed the Court's attention.

Moreover, since the Commission's finding, discussed next above, was obviously untrue, seemingly it should have wanted to buttress said finding by taking official notice of its own records, prepared by and filed with the Commission by the intervenors themselves. *49 U.S.C. 320(a).* For remember that at the time the Commission was writing it had available to it, not just three-quarters of 1963 but the full year, and in

[2]See Exhibit H-54 attached hereto as *Appendix A.*

addition all of the year 1964 and three-quarters of 1965. Means for positive determination were at the Commission's finger tips. It preferred to exercise its expertise by pure speculation. Its speculative forecast could have been confirmed or the positive contrarity determined. The Commission chose the course of "prejudicial error." Section 10(e), Administrative Procedure Act, last sentence.

Failure of the Commission to make all essential findings, and it certainly failed as we have clearly pointed out, condemns its order as void under Section 8(b), Administrative Procedure Act, as well as Section 10(e) thereof, along with the misapplication of prescribed criteria (standards) and the demands of the National Transportation Policy.

The Commission did discuss lack of substantial interchange of traffic between appellants herein, and based a conclusion of a new service to Arizona and California points thereon. But interchange of traffic is only one element for consideration in a Section 5 proceeding, *and is not* controlling[3] under standards

[3]See *Virginia-Carolina Freight Lines, Inc.–Control–Burlington Truckers, Inc.*, 87 M.C.C. 341 (344-345), where the Commission points out that there had been no prior interchange and said:

"That Virginia-Carolina and B-T did not interchange traffic with each other before the agreements were signed is not controlling, because they interlined with other carriers shipments moving between points in their respective territories. Compare Consolidated Freightways, Inc., Common Control Silver Fleet, 85 M.C.C. 139. To deny the application or to impose burdensome restrictions merely because the traffic in which B-T participated did not move in all directions, would not be warranted. D. C. Hall Co.–Purchase–Hall and D. C. Hall Transport, Inc., 70 M.C.C. 233. . . . The record warrants findings that protestants are well established carriers in the areas involved and should be able to withstand without undue difficulty the increased competition and possible loss of some traffic as a result of the transaction." (at page 446).

long recognized and established by the Commission itself. Interchange is not even necessarily required.[3] This is because, as explained in the *Virginia-Carolina Freight Lines, Inc.*, case (see quote preceding page), petitioners here "interlined with other carriers shipments moving between points in their respective territories." In *Consolidated Freightways, Inc.—Control—Silver Fleet* 85 M.C.C. 189, the Commission explained its holding in *Keeshin* in connection with what it felt had been a misunderstanding of *Keeshin*.[4]

In that connection the Examiner pointed out (Juris.

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[4] "In view of the foregoing, we believe it is apparent that the carrier protestants have misinterpreted the scope of the findings contained in the *Keeshin* case. While it is true that, as they contend, we found in such proceeding that the lack of substantial interchange between the applicants would have resulted in the creation of a 'new competitive service,' denial therein was based solely upon the adverse effect the transaction would have produced on the services and operations of competing carriers and the absence of any showing that approval of the transaction would result in offsetting advantages to the public.

"The importance in a section 5 proceeding of the factor of the quantum of traffic interlined in the past by applicants pertains entirely to the greater issue of the manner and extent which a transaction will affect the operations of competing carriers. In other words, a substantial interline of traffic between applicants in the past is generally indicative of the fact that existing carriers have already been faced with, and adjusted to, the competition of their joint-line service. Under these circumstances it can be fairly concluded, in most instances, that approval of a transaction would cause little impairment in the existing services of competing carriers. At the opposite extreme, in instances where applicants have not interlined traffic moving between their respective areas of operation with one another or other carriers, it is similarly evident that their unification could readily result in serious disruption of the present competitive balance and the impairment of the operations and services of competing carriers. It should be emphasized, however, that past interchange constitutes only one element in our appraisal of the effects a transaction would likely have upon the operations and services of existing carriers, and, by itself, is not controlling in the determination of the ultimate issue. Compare *Transcon Lines–Purchase–B & M Exp., Inc.*, 75 M.C.C. 693, and also *Transcon Lines–Purchase–Missouri-Oklahoma Exp., Inc.*, 80 M.C.C. 79."

Stmt., Appendix C, page C-24) that appellant-vendor interchanged freight in 1962 at Chicago, St. Louis, Tulsa and Oklahoma City; that "at Tulsa and Oklahoma City was with 22 carriers including Braswell." The record shows this. The Commission also so found (Juris.Stmt., Appendix B, page B-24).

But if proof of "need" was required, as it clearly is not, for other standards or criteria are prescribed,[5] nevertheless the Commission has utterly failed in performance of its duties and obligations to appellants and to the public as well. For appellants presented the evidence of seventy (70) shipper and receiver witnesses, coming from Chicago and St. Louis on the east to Los Angeles on the west.

The Commission did not even once refer to that evidence of record. The Commission simply ignored it. That is plain and simple arbitrarity and capriciousness, condemned by Section 10(e) of the Administrative Procedure Act.

In any event, the evidence of 70 shipper and receiver witnesses put the issue in question, if it was ever properly an issue in a Section 5 acquisition proceeding. It certainly brought into sharp focus the matter of public interest, but the Commission did not weigh the evidence or make the essential and required finding. If it was in issue the testimony of all those witnesses cannot be ignored as was done by the Commission, for Section 8(b) of the Administrative Procedure Act, *5 U.S.C. 1007(b)*, making findings with reasons

[5]It is nowhere even inferentially referred to under the criteria of Section 5(2)(a)(i), (b) or (c) nor in the National Transportation Policy.

therefor mandatory, without which the Commission's order is void. For a reviewing court, Section 10(d), Administrative Procedure Act, *5 U.S.C. 1009(d)*, "*shall* . . . (B) *hold unlawful* and set aside agency action, findings and conclusions," etc. Then follows condemning specifications (1) through (6).

The Commission, not even once, ever weighed the evidence via balancing the equities of existing carriers against the public interest and determining,

(1) Whether approval would result in offsetting advantages to the public; and,

(2) Whether approval or disapproval would more nearly conform with the policy of Congress declared in the National Transportation Policy.

Pacific Intermountain Express—Control—Keeshin, supra.

Again the Commission finds itself on the horns of another dilemma for it not only completely ignored the oral evidence of 70 public witnesses as pointed out above, but it finds itself in a contrarity of opinion in using the fact of Braswell's development of a substantial amount of traffic which it says will have a materially "adverse effect" on existing carriers, *but* in August, 1963, in the *Youngstown Cartage Co.—Control—Bigley Bros., Inc.*, 93 M.C.C. 318, 325, incidentally in which *there had been no prior interchange of freight*, the Commission said:

> "As indicative of operations performed under temporary authority, Cartage submitted an abstract of approximately 950 representative ship-

ments, averaging in weight from 228 pounds to 325,991 pounds, transported in approximately 1 week of each month from March 9, 1961, to February 10, 1962. These shipments originated at two points in Connecticut, one point in Delaware, three in Maryland, two in Michigan, six in New Jersey, eight in New York, eight in Ohio, and seven in Pennsylvania, destined to various points in all of the States authorized to be served by Bigley Bros. The commodities transported consisted of steel, steel products, contractors' equipment, machinery, and building materials. *While the service provided by Cartage under temporary lease operations is not conclusive, evidence thereof is admissible and properly to be considered with other evidence to determine whether the transaction and unified service would be consistent with the public interest.* See *Standard Motor Freight, Inc. — Purchase — Madison Transp.*, 65 M.C.C. 249, and *Ashworth Transfer, Inc.—Pur. —Wilcoxon and Fowkes*, 90 M.C.C. 107."

In the case at Bar and in *Youngstown Cartage* we have the question of application of criteria—standards —Section 207 (*49 U.S.C.* 307); new service, and Section 5(2)(b) and (c) *(5 U.S.C. 5(2)(b) and (c))* acquisition proceeding, with the overriding considerations of the National Transportation Policy.

In *Youngstown Cartage* the Commission says yea but in the case at Bar it says nay.

In *Youngstown Cartage* the Commission says that although the development of substantial business under temporary authority "is not conclusive," nevertheless, such evidence is proper and is to be considered

"to determine whether the transaction and unified service would be *consistent* with public interest." There the unification was authorized. Here it just about frightened the Commission out of its wits.

So here it resulted in that which the Commission is without statutory power to do, i.e., protect existing carriers, contrary to the intent of Section 207(b), *49 U.S.C. 307(b)*. The National Transportation Policy is the overriding Congressional command to the Commission. That policy together with Sections 5(2)(b) and (c) fix the standards or criteria within which the Commission must confine itself, and there is found no requirement for proof of need for the service as is found in a Section 207 application. *49 U.S.C. 307*.

WHAT THE DISTRICT COURT DID

The District Court (of three judges) begins its opinion by quoting what it calls the *"Statutes Involved"* and names as those involved Sections 5(2)(e)(i), 5(2)(b) and 5(13), *49 U.S.C. 5(2)(a)(i), 5(2)(b)* and *5(13)*, along with Section 210a(b), *49 U.S. 310a(b)*.

It does not name as involved Section 5(2)(c) which *directs* the Commission that "*In* passing upon any proposed transaction . . . the Commission *shall* give weight to the following considerations" and names them in (1), (2), (3), and (4) order. It must be assumed, therefore, that the Court gave no consideration to Section 5(2)(c), a direct command from Congress. Section 5(2)(c) was very much involved.

Neither did the Court in its opinion *ever once, not*

even once, refer to the Administrative Procedure Act, Sections 7(d), 8(b) or 10(e), *5 U.S.C. 1006(d), 1007(b)* and *1009(e)*. Nor did the Court ever refer to the National Transportation Policy, the policy which *must* be taken into consideration in all acquisition cases, whether purchase or control.

The Commission's violations and deficiencies in adjudication were the predicate for appellants' attack upon the order. For both the Commission and the Court below ignored or, in any event, utterly failed to consider and abide by statutory criteria—standards—prescribed by Congress. All that either the Commission or the Court did was, in fact and law, to apply the criteria of Section 207, *49 U.S.C. 207*—new certificate, which was utterly wrong and contrary to the Commission's statutory authority.

But Sections 7(d), 8(b) and 10(e), Administrative Procedure Act, were intended to mean something. They were intended to mean just what they say. They were intended to put restrictions upon the Commission's actions and adjudicative power. Appropriate criteria is essential to constitutional delegation of legislative authority, the bed-rock of constitutional delegation of legislative authority.

The cited sections of the Administrative Procedure Act and the National Transportation Policy *were very much involved*. The summation of what the Commission said, "*We must find*" as pointed hereinabove, demonstrates that the cited sections of the Administrative Procedure Act and the National Transportation Policy limit the actions of the Commission in

keeping it within the power delegated to it and form the very basis of the attack upon the order involved herein.

But not so, insofar as the Court below was concerned. The Court below gave no evidence of consciousness of Section 5(c) of the Interstate Commerce Act or of the cited sections of the Administrative Procedure Act.

The Court below in its adjudicative opinion:

First, said that "the evidence before Division 3 established the fact that the service proposed by Braswell from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier." (Juris.Stmt., Appendix A, page A-6).

But interchange of traffic is not controlling, as we have pointed out and as the Commission has often held. There is no indication here that the Commission was announcing a new policy or a departure from the principles of the *Pacific Intermountain Express* case, supra, with reference to Section 5(2)(b) cases.

Moreover, the Commission admits there was an interline of traffic.[6] The only record evidence is that such interline had extended over many years. Protesting intervenors-appellees here offered no contrary evidence.

Second, the Court below said that the evidence supports the Commission finding that Braswell "had built

[6]See Juris.Stmt., pages B-23, C-24, C-43, C-51.

a substantial operation to and from Arizona and California." (Juris.Stmt., Appendix A, page A-7). Admitted. However, (1) this is strong, though not conclusive, evidence, in the determination of the question of public interest, *Youngstown Cartage Co.—Control—Bigley Bros., Inc.*, 93 M.C.C. 318, 325; and (2) the only record evidence is undisputed that there had been no adverse effect (Juris.Stmt., footnote 3, page 16; Appendix A hereto attached).

Third, the Court below says that "Since the public interest requires that carriers already in a territory be protected, it is immaterial whether the attempt to invade is made through an application under Section 5 or one under Section 207." (Juris.Stmt., Appendix A, page A-7).

This holding shows prejudicial error, both by the Court and the Commission, in failing to observe and conform to the different standards and criteria fixed in Section 207, *49 U.S.C. 307*, from those fixed by Sections 5(2)(c) and the National Transportation Policy. Failing to recognize the *different* standards or criteria is fatal and specifically condemned by Section 10(e)(B)(1), (2), (3) and (4), *5 U.S.C. 1009(e)(B)(1), (2), (3) and (4)*.

Moreover, the Commission wholly *failed to make essential findings* in this Section 5 proceeding, "public interest" being the criteria and standard required, contrary to its long standing policy as shown by its own decisions, hence its order is condemned by Section 8(b), *5 U.S.C. 1007(b)*; and the Court below, apparently completely oblivious of the Administrative

Procedure Act and of Sections 8(b) and 10(e) in particular, perpetuates, frustrates and nullifies the Congressional intent and purposes to keep the Commission within defined statutory standards. Congress had as well have saved its time and effort and have allowed to the Commission carte blanc authority and provided for no judicial review.

But *the basic findings* in the context here presented and urged *must be made.* The Administrative Procedure Act so requires and the courts so demand. *Alabama Great S.R.Co. vs. United States,* 340 U.S. 216, and authority cited at page 228.

Fourth, the Court below then goes out on its own and decides for itself that the criteria of Section 207, *49 U.S.C. 307,* is the applicable criteria, saying:

> "The *most important issue* involved in this case *is not whether* the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations *but whether Braswell proved a public need for the new service.* The finding of the Commission that it failed to do so is supported by substantial evidence." (Emphasis supplied) (101 M.C.C. 1, 17) (Juris.Stmt., Appendix A, pages A-7 and A-8).

This finding is simply untrue. There is no substantial evidence to support it. The facts are that appellants presented 70 shippers and receivers on the witness stand. These witnesses testified to a need for the service. We have called attention to this heretofore. The use made of the service, which so startled the

Commission, strongly showed the need for the service. We have called attention to this heretofore and cited Commission decisions so saying. The Commission and the Court below chose to wholly ignore these facts. May they do so with impunity? See the Examiner's discussion as to these witnesses. (Juris.Stmt., Appendix C, pages 27-C through 30-C).

Well, irrespective of that holding by the Court below, the issues and the required material findings are fixed by Section 5(c); *49 U.S.C. 5(c)*, and the overriding National Transportation Policy. Nor can this be successfully controverted.

THE MOTIONS TO DISMISS OR AFFIRM

We feel that the foregoing background, interspersed with argument, is essential to proper consideration and determination of the motions to affirm and that to dismiss.

With that background, we may now more intelligently approach the validity of said motions, or the lack of it. For, as we pointed out almost at the very beginning hereof, the basic findings essential to the validity of a given order will vary with the statutory authority involved and the context of the situation presented.

This brings us to a consideration of the appellees' interpretations or misinterpretations of the questions presented.

The United States and the Interstate Commerce Commission say that "Appellants do not challenge the

standard of judicial review which the court below applied," and cite *Rochester Telephone Corp. vs. United States*, 307 U.S. 125, 138-140.

What kind of nonsense is this?

In *Rochester Telephone Co.*, supra, this Court mentions that the Court has evolved two specific doctrines, one, that of "primary jurisdiction," the other, the doctrine of "administrative finality." The doctrine of primary jurisdiction is not here involved. The doctrine of administrative finality is directly involved and the judgment of the court below is challenged.

Administrative finality restricts the range of the Court's review, but even so there are questions involved, as said in *Rochester Telephone Corp.*, supra, the questions being those (1) affecting constitutional power; (2) statutory authority; and (3) the basic prerequisites of proof.

Statutory authority not only involves Sections 5(2)(a)(i), 5(2)(b) and (c), *49 U.S.C. 5(2)(a)(i)* and *5(2)(b) and (c)*, but also equally involved are Sections 8(b) and 10(e) of the Administrative Procedure Act, *5 U.S.C. 1007(b) and 1009(e)*, and the National Transportation Policy.

In this respect note the extent to which the Court below determined the case based upon the statutory criteria of Section 207, *49 U.S.C. 307*, where the Court said "The most important issue involved in this case is . . . whether Braswell proved a public need" etc. See Juris.Stmt., page 10, the quote. That is literally a desertion of the statutory criteria of Section 5(2)(b)

and (c), *49 U.S.C. 5(2)(b)* and *(c)*, and the substitution by the Court below of the statutory criteria of Section 207, which is not within the power or authority of the Court below. The standard of judicial review, as well as of the Commission, is challenged in every question presented (Juris.Stmt., pages 11-12).

While, as we have heretofore admitted, the right of judicial review is limited, nevertheless the Court has authority, indeed the duty, to keep the Commission within the bounds of its constitutional and statutory authority and this requires, in fact demands, that the Court determine whether or not the Commission has (1) applied the proper statutory criteria and (2) has properly observed the limitations and restrictions put upon the Commission by the Administrative Procedure Act.

For "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Commission vs. R.C.A. Communications, Inc.*, 346 U.S. 86, 90.

The Commission must exercise power, and courts must so require, within the limits of the several statutes to which we have referred. And this includes not only the application of the criteria prescribed by Congress but also within the restrictive limitations of the Administrative Procedure Act.

In connection with appellants' insistence that the Commission applied the wrong statutory criteria, the United States and Interstate Commerce Commission say that the question has been raised but rejected in

a number of cases. Well, it was not raised in *Great Coastal Express, Inc. vs. United States,* 243 Fed.Supp. 943, for which it was cited; and it was not effectively raised in *Ratner vs. United States,* 162 Fed.Supp. 518, because the *Commission had found* that entry of applicant into the area in question would disrupt the competitive balance with harmful effect on competing carriers *without compensatory benefits to the public.* Thus *the necessity for an essential finding* is admitted but no such, or similar, finding was made by the Commission in this case.

We have heretofore pointed out that the basic findings essential to the validity of an order *will vary* with the *statutory authority* involved and the *context of the specific situation presented.* It is a situation varying from case to case. In our case here there is no corresponding finding.

Neither *Shein vs. United States,* 102 Fed.Supp. 320, nor any of the other cases cited by the United States and the Interstate Commerce Commission have anything to do with the situation here presented.

In *Shein,* supra, the action of the Commission was attacked as being arbitrary, capricious and not founded upon substantial evidence; and a question of burden of proof. No question was raised as to applicable statutory criteria or in connection with the Administrative Procedure Act.

The United States and the Interstate Commerce then say that "Appellants' other basic contention is that the Commission committed reversible error (1) in

not giving controlling weight to the revenues, tonnage and operating ratios of protestants" etc. Motion to Affirm, page 6. Well, call it controlling effect or what you like, the contention is that the revenues, tonnage and operating ratios referred to condemn the finding of the Commission that: "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers" etc. Juris.Stmt., Appendix B, page B-27.

The fact is that the finding, as shown by the revenues, tonnages and operating ratios, with the competitive operations of Braswell, show beyond peradventure of doubt that there was no "substantial adverse effect upon existing carriers." The finding, in the light of actual experience, is not supported by substantial evidence *and* the order is void under Section 10(e) of the Administrative Procedure Act.

The group of intervenor-appellees, other than Transcon Lines, says that that the sole question presented is whether the restrictions imposed are "in accordance with applicable principles of law, as set forth in prior decisions of the Commission and the courts."

We do not agree.

The principles set forth by the Commission in *Pacific Intermountain Express—Control and Purchase —Keeshin Freight Lines, Inc.*, 57 M.C.C. 467, are the principles, criteria or standards established by Congress in Section 5(2)(b) and (c) of the Interstate Commerce Act and attempted by Congress to be made secure in the National Transportation Policy.

True there have been varying decisions by the courts but these have gone off on other points. This is why, in the very beginning of this reply, we pointed out that the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented, citing *Alabama Great S.R. Co. vs. United States*, 340 U.S. 216, 228, and other Supreme Court decisions there cited.

The Commission has not departed from the principles laid down as to the essential and basic findings which "We must" make in a Section 5(2)(a) proceeding except as the Commission here wholly failed to make all of the "We must" findings; nor have the courts done so.

The Commission must make all of the essential findings, just as it has said, and failure to do so voids the order under Section 8(b) of the Administrative Procedure Act. The Commission has not done so.

This is the very reason why this Honorable Court first remarked in *State of New York, et al vs. United States, Interstate Commerce Commission, et al*, 342 U.S. 882, 884, and repeated in *Burlington Truck Lines vs. United States*, 371 U.S. 156, 167:

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But

the standards set for men of good will is even more useful to the venal."

Turning now to the motion to dismiss as filed on behalf of Transcon Lines, it may first be said that it is of no consequence and could as well be ignored. Transcon Lines' motion misses the case completely.

It says that the question is "whether (in) a unification proposed under Section 5(2), . . . is or is not consistent with the public interest, is the Commission without authority to condition its approval so as to prohibit authorization of new competitive services not shown to be required by the public need."

That question, not here involved, is purely academic.

We think that it can be. But certain it is that unless the Commission applies proper criteria and unless the Commission complies with Section 8(b), Administrative Procedure Act, and the National Transportation Policy *and makes* the necessary and essential findings, it cannot so condition its approval. Moreover, unless the Commission does these things, its order is void under Section 10(e), Administrative Procedure Act.

It is as simple as that. The order here is void.

IN GENERAL

What the Commission here, and also all counsel for all appellees, has forgotten is the requirement for basic findings.

In relation to this requirement we have discussed the deficiencies of the order here under review in

detail. In the light of *Pacific Intermountain Express—Control—Keeshin*, supra, we have pointed out very clearly the lack of essential findings, non-compliance with statutory criteria, violations of provisions of the Administrative Procedure Act, and other deficiencies of the order. We have pointed out that the Court below never at any time seemed to acknowledge the existence of the National Transportation Policy or of the Administrative Procedure Act.

But the requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact is a means provided by Congress for guaranteeing that cases such as this one shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations.

Section 8(b), Administrative Procedure Act, is the guaranteeing statute. Section 10(e) of the Administrative Procedure Act nullifies an order if Section 8(b) is not complied with. As said in *Commonwealth of Puerto Rico vs. Federal Maritime Boards*, 288 Fed. 2d 419:

> "The Administrative Procedure Act requires all decisions to state not only findings and conclusions, but also 'the reasons or basis therefor, upon *all* material issues of fact, law or discretion presented on the record . . .'" See *Secretary of Agriculture vs. United States*, 347 U.S. 645; *U.S. vs. Chicago M. St. P. & P.R.Co.*, 294 U.S. 499.

We cited *Florida vs. United States*, 282 U.S. 194, in our Jurisdictional Statement and now point out that what was there said has become settled doctrine in the federal courts. In *Colorado-Wyoming Co. vs. Federal*

Power Commission, 324 U.S. 626, 634, this Honorable Court said:

> "But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and *completeness* in the basic or essential findings on which administrative orders rest."

We have here pointed out the utter lack of completeness of basic findings based upon what the Commission acknowledges and said in *Burlington Truck Lines vs. United States*, supra, that "we must" consider. Likewise we have pointed out the lack of *any* substantial evidence to support the findings made.

PRAYER

Appellants earnestly contend that the order here under review is void for all of the deficiencies pointed out and that the motions to affirm and the one to dismiss are without merit, and pray that said motions be overruled and that this Court note jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, T. S. Christopher, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1967, I served copies of the foregoing Reply to Motions to Dismiss and to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Gregory B. Hovendon, Attorney, Department of Justice, Washington, D. C. 20530; and to Hon. Seymour H. Dussman, Attorney, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, and to Hon. Emmanuel H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Build-

ing, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.

T. S. CHRISTOPHER
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Fort Worth, Texas 76102
Attorney

APPENDIX A

Exhibit No. H-54
Witness .....

Abstract showing list of carriers, total operating revenue, tonnage handled, and operating ratio. Source of obtaining information was *CARRIER REPORTS* Annual and Quarterly reflecting information filed by Carriers annually and quarterly with the Interstate Commerce Commission. Periods covered are 1959, 1960, 1961, 1962 and the 1st and 2nd Quarters of 1963.

Stricken except as to carriers protestants in this proceeding.

CARRIERS	1959			1960			1961			1962		
	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio
Arkansas-Best Freight System	14334	457	93.9	14495	455	96.5	15895	428	92.0	16855	503	91.5
Be-Mac Transport Company	6008	255	94.3	5962	236	98.3	6559	242	91.7	7054	267	91.5
Campbell Sixty-Six Express	15800	598	90.6	16662	629	93.3	18028	648	91.5	18331	637	92.3
Consolidated Forwarding	7309	257	96.1	7433	251	98.3	8316	274	93.9	9083	300	94.8
Consolidated Freightways, Inc.	78390	4630	96.7	99863	4866	99.1	86793	4907	97.0	85215	5217	98.9
Delta Motor Lines, Inc.	8748	351	97.0	8019	310	101.2	8557	325	97.9	8208	319	101.8
Denver Chicago Trucking Co.	39704	621	91.8	40592	638	90.3	42259	654	90.1	43838	672	91.1
East Texas Motor Freight Lines	16117	467	92.2	15712	452	95.1	17483	487	98.9	19157	530	91.3
Frisco Transportation Company	3280	156	105.0	3081	129	98.1	3088	128	97.5	3058	133	100.6
Garrett Freightlines	17900	469	89.4	18229	476	93.0	29770	935	91.4	31151	943	93.5
Gillette Motor Transport	6636	227	89.1	6548	222	97.4	7146	242	97.3	8003	276	94.3
Gordons Transports, Inc.	16963	623	93.9	17063	632	98.1	20775	725	96.9	23523	784	95.9
Illinois-California Express	15705	290	88.5	25266	640	93.1	26046	546	92.6	27434	564	92.6
Interstate Motor Lines	20074	374	86.3	20427	382	91.2	23848	427	85.9	26244	465	88.4
Jones Truck Lines, Inc.	7967	358	94.5	9234	420	95.6	9698	433	92.6	10465	458	90.9
Knaus Truck Lines	5902	217	107.8	5599	206	114.6	See Missouri Consolidated for 1961 and 1962.					
Leeway Motor Freight Lines	12678	464	89.7	12205	445	98.8	16148	533	96.7	16435	539	95.8
Mid-Continent Freight	4091	112	107.5	2030	—	113.9	2952	74	96.9	3657	87	98.9
Missouri Consolidated	See Knaus Truck Lines for 1959 and 1960.						4044	135	111.7	4290	126	88.3

Add 000 to all Columns (except operating ratio)

CARRIERS	1959			1960			1961			1962		
	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio
Missouri Pacific Freight Transport	5244	356	101.7	5741	337	99.0	6083	344	99.4	6174	358	98.7
Navajo Freight Lines	26571	578	91.2	27870	582	97.7	28820	636	95.3	30248	609	97.2
Pacific Intermountain Express	62517	2993	94.4	58304	2704	97.2	60215	2570	94.3	65499	2721	94.0
Ringsby Truck Lines	16422	335	98.7	17163	379	97.0	19041	400	95.0	20772	438	95.3
Roadway Express	65510	1543	93.1	70719	1639	92.2	78106	1748	91.9	88716	1929	90.6
Ryder Truck Lines of Missouri (Southern Plaza)	11581	379	100.4	11130	358	104.8	11010	340	99.6	11039	342	106.9
Southwestern Transportation Co.	7416	333	91.1	7205	323	93.7	7148	290	95.6	7984	298	98.9
Strickland Transportation Co.	11347	352	94.8	13485	407	96.3	15035	461	96.4	Not Available		
Texas-Arizona Motor Freight	6902	154	88.8	7316	161	96.4	6808	145	92.8	7081	144	95.5
T.I.M.E. Freight, Inc.	18516	449	93.4	16546	383	95.6	17420	383	92.4	19392	408	90.5
Transamerican Freight Lines	42686	1506	98.2	43301	1517	99.6	43750	1484	98.9	44818	1540	98.0
Transcon Lines	19347	355	90.8	22570	452	94.9	23978	460	90.8	26519	470	87.1
Viking Freight Company	14313	511	94.3	14308	518	97.1	15545	545	94.4	17774	605	96.6
Voss Truck Lines	2405	77	95.4	2227	73	98.8	2384	79	92.6	2779	100	95.5
Watson Bros. Transportation Co.	41097	1128	96.6	38139	1030	100.4	50039	1376	98.3	48697	1226	103.5
Western Truck Lines	12686	391	97.0	13202	388	100.4	13900	395	99.4	14933	405	99.3
Wilson Truck Co.	11394	354	93.6	11035	342	95.4	Included with Watson Bros. for 1961 and 1962.					
Yellow Transit Freight Lines	31339	1207	92.6	31061	1223	95.7	25847	944	93.0	28744	1025	86.7

Add 000 to all Columns (except operating ratio)

CARRIERS	1st Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO	2nd Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO
Arkansas-Best Freight System	4103	125	94.8	4558	138	89.0
Be-Mac Transport Company	1734	65	95.2	1829	70	91.7
Campbell Sixty-Six Express	4384	151	97.3	4909	172	89.5
Consolidated Forwarding	2268	74	94.8	2468	81	92.7
Consolidated Freightways, Inc.	28520	1190	103.3	30058	1162	98.8
Delta Motor Lines, Inc.	1661	64	117.1	1714	67	112.2
Denver Chicago Trucking Company	10720	162	93.6	11340	167	90.1
East Texas Motor Freight Lines	4891	135	94.0	5301	147	90.7
Frisco Transportation Company	657	23	107.2	706	24	103.0
Garrett Freightlines	7656	226	93.6	8351	240	90.6
Gillette Motor Transport	1939	67	89.5	2118	73	94.2
Gordons Transports, Inc.	5140	166	101.7	5421	175	97.4
Illinois-California Express	6805	133	97.7	7218	143	94.2
Interstate Motor Lines	6660	118	92.4	8302	168	90.5
Jones Truck Lines, Inc.	2639	117	92.7	2830	123	93.3
Leeway Motor Freight Lines	3984	131	98.5	4359	147	94.9
Mid-Continent Freight	911	22	99.7	983	24	96.2
Missouri Consolidated	1256	36	91.1	1404	37	88.5

Add 000 to all Columns (except operating ratio)

CARRIERS	1st Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO	2nd Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO
Missouri Pacific Freight Transport	1740	94	100.7	1835	104	98.5
Navajo Freight Lines	7028	124	98.9	7601	136	96.2
Pacific Intermountain Express	16063	666	97.2	16909	689	93.6
Ringsby Truck Lines	4964	104	95.9	5517	110	95.2
Roadway Express	20389	440	93.8	22638	489	89.3
Ryder Truck Lines of Missouri (Southern Plaza)	2563	82	112.8	2583	82	107.4
Southwestern Transportation Co.	1913	71	99.5	2135	79	94.8
Strickland Transportation Co.	3439	100	101.2	3895	116	97.8
Texas-Arizona Motor Freight	1813	37	94.5	1833	37	94.8
T.I.M.E. Freight, Inc.	5124	105	92.9	5391	109	89.7
Transamerican Freight Lines	9824	333	102.7	11320	391	94.0
Transcon Lines	6792	113	88.8	7669	123	85.6
Viking Freight Company	4330	145	99.8	4714	156	93.5
Voss Truck Lines	700	25	111.8	795	29	100.1
Watson-Wilson Transportation System	9923	255	105.6	9092	208	99.8
Western Truck Lines	3826	103	91.9	3841	105	96.1
Yellow Transit Freight Lines	7685	274	86.9	8802	320	83.2

Add 000 to all Columns (except operating ratio)

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No. 790

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BRASWELL MOTOR FREIGHT LINES, INC., ET AL, *Appellants*

vs.

UNITED STATES OF AMERICA, ET AL, *Appellees*

On Appeal from the United States District Court
for the Western District of Texas

Appellant's Motion for Rehearing

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vs.

UNITED STATES OF AMERICA, ET AL, *Appellees*

On Appeal from the United States District Court for the Western District of Texas

Appellant's Motion for Rehearing

Pursuant to Rule 58 of the Rules of the Supreme Court Appellant, Braswell Motor Freight Lines, Inc., files this its motion for rehearing and says:

Each of the several questions presented in the Jurisdictional Statement when refined resolve themselves into a single important question as follows:

Is the Respondent Commission required to comply with the mandatory requirements of the Administrative Procedure Act, 5 U.S.C., 1001 et seq, and in particular with Sections 8(b) and 10(e) thereof? 5 U.S.C., 1007(b) and 1009(e).

The purpose and intent of Congress in passage of the Administrative Procedure Act was clearly to confine administrative agencies, such as respondent Commission here, within fixed positive requirements as

well as limitations. *Wong Vang Sung vs. McGrath*, 339 U.S. 33, discusses rather fully the purpose and legislative history. Suffice to say here the purpose was that it act as a check upon administrators to correct abuses and to create safeguards "even narrower than constitutional one" against arbitrary encroachment upon rights. *United States vs. Morton Salt Co.*, 338 U.S. 632.

Among such safeguards are those of Sections 8(b) and 10(e), 5 U.S.C. 1007(b) and 1009(e). Each are highly pertinent and important here. Section 10(a) and (c) provides the positive remedy of judicial review.

Section 8(b) is mandatory providing that, "All decisions (including initial, recommended or tentative decisions) *shall* become a part of the record and *shall* include a statement of (1) *findings and conclusions*, as well as *the reasons or basis therefor*, upon *all* the *material issues of fact, law, or discretion* presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof."

This language is mandatory and exacting. In this respect the Respondent — Commission's order wholly and utterly fails to comply. Under the exacting provisions of Section 8(b), quoted above the Commission has said that in a Section 5 proceeding (acquisitions) 49 U.S.C. 5, that "We must find;"

(1) "That it will be consistent with the public interest, a concept which;"

(2) "Has direct relation to adequacy of transportation service;"

(3) "To its essential conditions of economy and efficiency;"

(4) "To appropriate provision and best use of transportation facilities;"

(5) The "interest of competing carriers;" and

(6) "That of shippers and consignees."

And the Commission explained that:

(1) It "*is our duty* to consider the effect which a proposed *new unified* service will have on the continuance, efficiency and economy of existing carrier services;"

(2) "If such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency and economy, to the detriment of the public;" then,

(3) "Whether it would result in offsetting advantages to the public;" and,

(4) "Whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Pacific Intermountain Express—Control—Keeshin, 57 M.C.C. at page 470.

The Respondent—Commission's decision is before the Court. Reported at 101 M.C.C. 1. It utterly fails to make findings and conclusions, as well as the reasons or basis therefor, upon *all* material issues" etc.

Commission made only one of the essential findings of the several which it said "We must find," which is as follows:

> "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California and our findings will be conditioned accordingly." (Juris.Stmt., Appendix B, page B-27).

And that finding or conclusion is not supported by substantial evidence. Fact is that that finding is directly contrary to the undisputed evidence. But see the Examiner, Report and Order, Jurisdictional Statement, Appendix C, which does comply with Section 8(b), Administrative Procedure Act, which is full and complete and does consider all of the "*Musts*" set out above.

If Section 8(b), 5 U.S.C. 1007(b), means what it says, and we do not see how it can be disputed, then the Commission's decision is void and this Court should so say.

Let us now consider Section 10(e), 5 U.S.C. 1009 (e). It too is mandatory. It is unnecessary to quote at length. But it does say the "reviewing Court' . . . *shall* . . . (B) hold *unlawful* and set aside agency action found to be unlawful and set aside action . . ." etc., then follows six specific reasons plus a requirement that "and due account *shall be taken* of the rule of prejudicial error."

The fact that the Commission wholly failed to comply with the requirements of Section 8(b) makes the Commission's decision "(1) arbitrary, capricious, an abuse of discretion" and not "in accordance with law.' Section 10(e). Also "(3) in excess of statutory jurisdiction, *authority, or limitations, or short of statutory right.*"

And harken to this 10(e), "(4) without observance of procedure required by law," for there was surely and certainly no "observance of procedure" required by Section 8(b).

Then follows the requirement that the reviewing Court "shall" . . . (B) hold unlawful and set aside agency action . . . (5) unsupported by substantial evidence, see also "(6)," Ibid.

The sole determining finding of the Commission is quoted hereinabove. It is not supported by substantial evidence. To the contrary the only reliable and the undisputed evidence is the operating reports of the carriers themselves, received in evidence, discussed by the Examiner, and collated for the Court at page 16 of the Jurisdictional Statement herein, during a competitive period of operation. See also Exhibit No. 54. These reports (from official records) show with positive certainty that contrary to the Commissions finding quoted above, that none of the existing carriers had or would suffer any "adverse effect" whatever, much less that there would be a "substantial adverse effect."

Under the facts of this case this Honorable Court has a positive duty to hold the Commission order void.

Appellant has been raising this question from the day its original petition for review was filed in the District Court of the Western District of Texas, El Paso Division but both that Court, and thus far this Honorable Court, has brushed it aside as nothing. Well that is to write the Administrative Procedure Act out of the statutes so far as Appellant is concerned. That is a positive personal wrong.

The trial court did not even mention any section of the Administrative Procedure Act as even having any bearing upon its certainly erroneous decision. It sustained respondent — appellee's decision, which under facts here present, Congress has decreed to be void. In these circumstances the obligation of this Honorable Court to safeguard the rights of Appellant as Congress intended by the Administrative Procedure Act becomes more onerous and compelling.

Surely this Honorable Court is not going to sanction such conduct of the Interstate Commerce Commission or of the Court below.

Appellant prays that this motion be granted; that the per curiam be set aside; that the order of the Commission and the decision and judgment of the Court below be set aside and the matter be remanded to the Court below or to the Commission with instructions, and will ever so earnestly pray.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, T. S. Christopher, attorney for appellant, hereby certify that the foregoing motion is presented in good faith and not for delay; that counsel verily believes under applicable law that the motion should be granted and the cause remanded with instructions.

s/ T. S. Christopher

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Attorney for Appellant,
Braswell Motor Freight Lines, Inc.

PROOF OF SERVICE

I, T. S. Christopher, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1967, I served copies of the foregoing Reply to Motions to Dismiss and to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Gregory B. Hovendon, Attorney, Department of Justice, Washington, D. C. 20530; and to Hon. Seymour H. Dussman, Attorney, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, and to Hon. Emmanuel H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addresed enevlopes, postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Build-

ing, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BRASWELL MOTOR FREIGHT LINES, INC., ET AL.
v. UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

No. 790. Decided January 15, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.